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NO. A-591

IN THE

SUPREME COUT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

V.

STATE OF NORTH CAROLINA,

Respondant.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

Whether the Petitioner was deprived of his constitutional right to 'individualized consideration" as guaranteed by the Eighth and Fourteenth Amendements to the United States Constitution in being sentenced to death pursuant to a statute that permitted the jury to return its recommendation for a sentence of death without specifying which of the mitigating circumstances it found to exist.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CASES AND AUTHORITIES	iii
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSIONS	10
APPENDIX A: Opinion of The Supreme Court of North Carolina.	A-1
APPENDIX B: Order Staying Execution	A-65
APPENDIX C: Extension of Time For Filing Petition	A-66
APPENDIX D: North Carolina General Statute 15A-2000 et seq.	A-67

TABLE OF CASES AND AUTHORITIES

CASES	Page
FURMAN v. GEORGIA, 408 U. S. 238 (1972)	6
GREGG v. GEORGIA, 428 U. S. 153 (1976)	6
LOCKETT v. OHIO, 438 U. S. 586 (1978)	6
PROFFIT v. FLORIDA, 428 U. S. 242 (1976)	6,8,10
WOODSON v. NORTH CAROLINA, 428 U. S. 280 (1976)	6

CONSTITUTIONAL PROVISIONS

Constitution of the United States	2
Eighth Amendment	2
FOURTEENTH AMENDMENT	2

STATUTORY PROVISIONS

Title 28, United States Code, Section 1257(3)	1
North Carolina General Statutes (Supp. 1979)	
15A-2000	3
15A-2000(b)	7
15A-2000(c)	8
15A-2000(d)(2)	9

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-v-

STATE OF NORTH CAROLINA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner, John William Rook, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ N. C., _____, _____, S.E.2d_____ (1981), and is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 3, 1981. By operation of North Carolina law, an execution date of February 19, 1982 was thereafter established for petitioner. On December 17, 1981, however, the Supreme Court of North Carolina stayed petitioner's execution pending its further orders. On December 30, 1981, this Court, per Mr. Chief Justice Burger, granted petitioner's application for an extension of time to February 1, 1982, within which to file his petition for a writ of certiorari (Appendix B). This Court's jurisdiction to review by writ of certiorari is invoked under U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N] or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

Petitioner, John William Rook was convicted and sentenced to death by a Wake County, North Carolina, jury in October, 1980, for the murder of Ann Marie Roche.

The State presented evidence showing that Ann Marie Roche was walking along a road in Raleigh, North Carolina on May 12, 1980 when her path was blocked by a car being driven by a person who was later identified as the Petitioner (T.72-73) by several witnesses. (T. 63,72,75). As Ms. Roche approached the car the two had a brief conversation and then began to argue and the Petitioner began to beat her (T. 71). The witnesses saw the car leave with Ms. Roche in the passenger seat (T. 125). On May 13, 1980, a patrol officer on routine patrol discovered the body of Ann Marie Roche in a large open field (T. 108, 109) and medical evidence showed that she had been beaten, cut with a knife, raped and had been run over by an automobile. (T. 164-174). The Petitioner made a statement to the police, confessing that he met Ann Marie Roche while she was walking along a road; that she got into his car and they drove to a large open field. (T. 142) He told her to get out of the car and after hitting her with a tire tool he proceeded to have sexual intercourse with her (T. 143). She started fighting him and he said he went crazy (T.143) and started hitting her. He hit her with the tire tool and swung at her with a knife, and struck her with the knife on the face and neck, though not meaning to hit her (T. 143). He stated that he ejaculated and then tried to have anal

intercourse (T. 143). He stated he started hitting her again but she did not move (T. 144). The Petitioner stated that he got in his car and drove down to turn around; stating that he could barely see over the steering wheel and did not mean to run over her (T. 144). He then went on home and told no one what he had done (T. 144).

The Petitioner offered no evidence. The trial court instructed the jury which returned verdicts finding the Petitioner guilty of first degree murder, first degree rape, and kidnapping (T. 175-202).

After the verdict of guilty of first degree murder, the trial court, pursuant to North Carolina General Statute 15A-2000, convened the trial jury on the sentencing phase of the trial to determine whether the Petitioner should be sentenced to death or life imprisonment. The State offered no additional evidence during the sentencing phase.

The Petitioner presented evidence at the sentencing phase of the trial through his brother and sister, who described their life with their parents. In addition, the Petitioner offered evidence through two psychiatrists.

After this testimony and arguments of counsel the jury was instructed on these aggravating circumstances in the following language:

1. "Was this murder committed while John William Rook was engaged in the commission of the rape of Ann Marie Roche. (T. 243)?

   ...

   "Now, if the State has so convinced you beyond a reasonable doubt and you so find beyond a reasonable doubt then you would write 'yes' after that alleged aggravating circumstance." (T. 243,244)

   ...

   "However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, you would not find this aggravating circumstance and would so indicate by having your foreman write 'no' in the space after that alleged aggravating circumstance." (T. 244)

2. "Was this murder committed while John William Rook was engaged in the commission of the kidnapping of Ann Marie Roche?"(T. 244)

   ...

   "... if you so find from the evidence beyond a reasonable doubt ... so indicate by having your foreman write 'yes' in the space after the second alleged aggravating circumstance." (T. 244)

   ...

   "... if you do not so find, or if you have a reasonable doubt as to anyone or more of these things, you

you would not find this aggravating circumstance and would so indicate by having your foreman write 'no' in the space following that alleged circumstance."

(T. 244,245)

3. "Was this murder especially heinous, atrocious, or cruel?" (T. 245)

...

"If you find from the evidence in this case ... you would so indicate by having your foreman write 'yes' in the space after this alleged circumstance on this issue and recommendation form." (T.245)

...

"... if you do not so find ... indicate by having your foreman write 'no' in that space."

The jury was instructed on the mitigating factors in the following language: [1]

"Now, Issue Number Three reads as follows: 'Do you find one or more mitigating circumstances?" (T. 247

...

"... in this case there are sixteen possible mitigating circumstances that are listed on this form and that you should consider each of them before answering Issue Number Three." (T. 247)

...

"... if the evidence satifies you that a mitigating circumstance does exist, you would then find that circumstance. If no, you would not find it." (T.248)

...

"... it will be your duty on this issue, if you reach it and if you answer it, to consider the following mitigating circumstances, and any other which you find from the evidence." (T. 248)

...

---

1. The mitigating circumstances submitted to the jury were:

(a) That this murder was committed while John William Rook was under the influence of mental or emotional disturbance.

(b) The capacity of John William Rook to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(c) The age of John William Rook at the time of this murder is a mitigating circumstance.

(d) John William Rook, in his formative years, was subjected to cruelty and physical abuse by his parents.

"... regarding Issue Number Three, members of the jury, if you do find one or more of these mitigating circumstances from the ... evidence, you then answer Issue Three 'yes'. However, if you do not so find at least one of these mitigating circumstances from the evidence, you would then answer Issue Number Three 'no'" (T.254)

...

"... if you unanimously find beyond a reasonable doubt that the aggravating circumstances found by you outweigh the mitigating circumstances found by you, you would then answer Issue Number Four 'yes'" (T. 255)

...

"... if you answer Issue Number Four 'no', it would then be your duty to recommend that the defendant be sentenced to life imprisonment.

(e) John William Rook, in his formative years, was subjected to mental abuse by his parents.

(f) John William Rook, in his formative years, was subjected to emotional abuse by his parents.

(g) John William Rook has been a loving and affectionate husband to his wife.

(h) John William Rook has been loving and affectionate to his brothers and sisters and their children.

(i) John William Rook is an alcoholic.

(j) John William Rook is an abuser of drugs and is addicted to drugs.

(k) John William Rook was sexually abused by an older man whom he lived with when he was 10 years old in order to have a more stable home environment.

(l) John William Rook had a deprived and chaotic childhood in which he was schooled in violence and criminality by his parents.

(m) John William Rook now has an IQ of 71 and received very little education in his formative years.

(n) John William Rook, in his formative years, received very little religious and moral training.

(o) John William Rook confessed in detail as to what he did and cooperated with the detectives and investigators of the Raleigh Police Department and Wake County Sheriff's Department as to his involvement.

(p) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.

> If, however, you answer Issue Number Four 'yes', it would then be your duty to recommend ... that the defendant be sentenced to death." (T.255)

In the verdict, the jury found all three of the aggravating circumstances to exist and indicated so by writing "yes" after each individual issue. (T.258) As to Issue Three "Do you find one or more mitigating circumstances?" The jury indicated that it did by writing "yes" after the issue; however, the jury did not indicate which of the mitigating circumstances it found to exist or be nonexistent. (T.259, 260) The jury further found that the mitigating circumstances did not outweight the aggravating circumstances and that the aggravating circumstances were sufficiently substantiated to call for the death penalty. (T. 260)

The North Carolina Supreme Court affirmed Petitioner's conviction and death sentence, explicitly finding that the court did not err in permitting the jury to return its recommendation for a sentence of death without specifying which of the mitigating circumstances it found to exist. State of North Carolina v. Rook, _____N.C. _____, _____ S.E.2d 510, _____(1981)

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS SANCTIONED CAPITAL SENTENCING PROCEDURES WHICH VIOLATED PETITIONER'S RIGHT TO "INDIVIDUALIZED CONSIDERATION", IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Furman v. Georgia, 408 U.S. 238 (1972) this court concluded that discretionary sentencing in a capital trial "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). In order to accomplish this, the sentencing authority's discretion must be "guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." Proffitt v. Florida, 428 U.S. 242, 258 (1976). In Woodson v. North Carolina, 428, U.S. 280, 304--305 the court states that consideration of the "character and record of the individual offender and the circumstances of the particular offense ... [is] a constitutionally indispensable part of the process of inflicting the penalty of death." In Lockett v. Ohio, 438 U. S. 586,604-05

(1978) (Burger, C.J.; plurality opinion) the court expounded on the concept of "individualized consideration" as a constitutional requirement.

> "(T)he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death ... The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. ... The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
>
> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

It is the contention of this Petitioner that the North Carolina Statutes[2] permitting the jury to return its

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[2] N.C.G.S. 15A-2000 et seq.

recommendation for a sentence of death without specifying which of the mitigating circumstances it found to exist violates the constitutional right of "individualized consideration" and therefore violative of the Eighth and Fourteenth Amendments of the United States Constitution.

North Carolina General Statute 15A-2000 sets out the procedures for the sentencing phase in a capital case. Section (b) of the statute requires, first, that in all capital cases:

> "[T]he judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence.

"After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life."

Section (c) provides:

"(c) Findings in Support of Sentence of Death-- When the jury recommends a sentence of death, the foreman of the jury shall on behalf of the jury show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are sufficient to outweigh the aggravating circumstance or circumstances found."

Section (e) then lists the available aggravating circumstances, and section (f) suggests a list of mitigating circumstances which the jury may consider but to which it is not limited because of the open-ended language found in section (f)(9).

At Petitioner's trial, the jury was submitted and it returned, three aggravating circumstances; it was also submitted sixteen mitigating circumstances but did not specify which mitigating circumstances it found, only that it found "one or more" to exist. The Supreme Court of North Carolina upheld the trial court's failure to instruct the jury to answer specifically whether or not each mitigating circumstance did or did not exist.[3]

Petitioner would agree to this court that such a construction of North Carolina's death penalty statute prejudiced the Petitioner at his trial and appeal to the North Carolina Supreme Court and denies to him his constitutional right of "individualized consideration" as that concept is set out in Lockett.

As J. Exum stated in his dissent in present case[4] "regarding the jury to specify in writing the aggravating, but not the mitigating, circumstances... prejudices the defendant at the sentencing hearing. It encourages the jury to think that the mitigating circumstances are less worth than the aggravating circumstances."

Petitioner is prejudiced not only at trial, but also on appeal to the North Carolina Supreme Court since the statute requires that that court review the case to consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[5] As J. Exum stated in the dissent "We cannot ... determine whether the sentence of death in any particular case is excessive or disproportionate when compared with similar cases 'considering both the crime and the defendant' unless we know both the aggravating and the mitigating circumstances found by the jury to exist.[6]

It is submitted that a substantial constitutional question is raised concerning

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[3] "It follows, then, that there exists no constitutional requirement of specific findings on mitigating circumstances and a failure of the trial court to instruct the jury to make specific findings was not error." State v. Rook, _____N.C. _____,p_____(1981)

[4] Id at p _____

[5] G. S. 15A-2000(d)(2)

[6] State v. Rook, _____N.C._____, _____(1981)

the procedure which the Supreme Court of North Carolina has adopted by its decision in the present case and that such a decision failed to allow for "individualized consideration" of the Petitioner. In the instant case the majority opinion seems to indicate that it is enough, for purposes of their appellate review, that they know what mitigating circumstances were submitted to the jury rather than what mitigating circumstances were found to exist by the jury. In order to properly review the sentence in a capital it is essential that the sentence reviewer know exactly what the jury considered in reaching its decision, not only aggravating circumstances but mitigating circumstances as well. In Lockett, the court stated that it could not "... avoid the conclusion that an individualized decision is essential in capital cases."[6] It is submitted that in this case the failure of the trial court to require the jury

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6. Lockett v. Ohio, supra 438 U.S. 586.

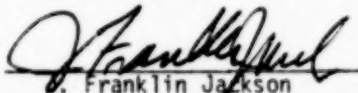
to specify which of the mitigating circumstances it found to exist violated Petitioner's constitutional right to "individualized consideration" guaranteed by the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons stated above, Petitioner prays that this Court grant the Petition.

Date: April 16, 1981.

Respectfully Submitted,



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APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM 1981

STATE OF NORTH CAROLINA)
)
V) No. 2 - Wake
)
JOHN WILLIAM ROOK)

Appeal from judgments entered by Clark, Judge, at the 6 October 1980 Criminal Session of Superior Court, Wake County. Defendant was convicted by a jury of first degree rape, kidnapping, and first degree murder. For his conviction of first degree murder, defendant was sentenced to death. Defendant received consecutive life sentences for the crimes of kidnapping and first degree rape. From all these judgments, defendant appeals to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

C. D. Heidgerd and J. Franklin Jackson for the defendant.

CARLTON, Justice.

Defendant brings forth assignments of error relating to several pre-trial matters, an alleged error in the guilt determination phase of his trial and several alleged errors relating to the sentencing phase of his trial. After a careful consideration of these assignments, as well as the record before us, we find no error in any of these proceedings and affirm.

I.

At trial, evidence for the State tended to show that at approximately 7:20 p.m. on 12 May 1980, Ann Marie Roche, a registered nurse, was walking home on Avent Ferry Road. She was clad in a T-shirt and blue jeans, was wearing glasses and was carrying a

brown gym bag. As she was nearing the Lake Raleigh Road intersection defendant, who was driving a Mercury automobile borrowed from his neighbor, turned left onto Lake Raleigh Road and blocked her path. Defendant beckoned Ms. Roche and she approached his car. The two talked for several minutes and then began arguing and, within seconds, defendant began to beat her.

All of this was observed by Howard B. Harris, Jr., who lived on Avent Ferry Road, and George Edward Schlager, who was jogging by. Mr. Schlager approached the car just as defendant was beating Ms. Roche. Ms. Roche was on the ground with her back against the driver's door. Her face and arms were cut and bleeding, and defendant was crouching over her, armed with a stick or some other object about one or two inches in diameter. Mr. Schlager asked if he could help and defendant stood and replied, "just go on, man, this doesn't concern you." Mr. Schlager then saw Mr. Harris and went to confer with him. Both saw the car leave with Ms. Roche in the passenger seat, with her head down, crying. Mr. Schlager jogged toward the car and observed the license number, RAP-980. He wrote the number on a matchbook and gave a copy of it to Mr. Harris.

Two other persons, Donna Atkins and Pamela Dodd, observed the struggle between Ms. Roche and her assailant. Ms. Atkins positively identified defendant as the assailant. Ms. Dodd observed a man beating a young woman. She testified:

> I saw a guy over the front seat beating a girl brutally. The steering wheel appeared to jar at times he was beating her so hard. Then they were out of the car. He was swinging her around by the hair on the ground once that I can remember. At that time I ran in the house and called the police.

Although Ms. Dodd did not positively identify the assailant as the defendant, her description of the assailant matched that of the defendant.

Officer Ronnie Holloway arrived in the area at approximately 7:30 p.m. in response to the calls. Although he patrolled the area, he could not find the car.

On 13 May 1980 at approximately 7:30 p.m., Norman Cash, a patrol officer with Dorothea Dix Hospital, was on routine patrol in the area just south of Lake Raleigh. In a large, open field he discovered a pile of clothing and a billfold. A short distance away, he observed a body and notified the Wake County Sheriff's Department. Deputy Pickett of the Wake County Sheriff's Department was called and he, too, observed the body. At 8:45 p.m., Officer William E. Hensley, a crime scene specialist, was called to the scene. He observed a white female body, badly bruised and battered, with cuts and abrasions. The ground around the body was covered with blood. The body was nude and was approximately thirty-five feet from the pile of clothing. A T-shirt, blue jeans and glasses were recovered as well as other articles including a brown bag. The body was identified as Ann Marie Roche.

From the license number recorded by Mr. Schlager the police were able to trace the car and locate the owner. On 15 May 1980, Officer Holloway went to Stovall Drive and found the car in question. Surveillance was set up and the car was subsequently stopped by officers. It was operated by Ms. Edwards, the owner, who told the police that defendant had borrowed her car on the evening of 12 May 1980. She told police that when he borrowed the car, defendant was dressed only in blue jeans, was

barefooted, and had pulled his hair back in a pony tail. This description matched that given by all the witnesses to the assault. Surveillance of the area continued and the defendant was observed entering a trailer near where the car was parked. Raleigh police officers approached the trailer, knocked on the door, and were told to enter. Inside were two white males, two white females and a small child. Sergeant G. W. Black requested permission to search for defendant and this was denied. Shortly thereafter, however, the defendant came from the hallway of the trailer and stated, "I guess I'm the one you're looking for." Defendant was then taken into custody and placed in a patrol car.

On 15 May 1980, Deputy Sheriff P. J. Bissette obtained a search warrant to search the trailer where defendant had been arrested and conducted a search. During the search, Officer Bissette found and seized a pair of blood-stained blue jeans. Officer Hensley, who assisted in the search, found a Rapala Finland knife and a leather carrying case on the dash of a vehicle parked in front of the trailer. He then inspected the Mercury vehicle which had been taken to the Wake County Courthouse and found fresh stains on the driver's side as well as grass caught between certain sections of the vehicle. He observed red stains on the hubcaps and underneath the vehicle. During the autopsy of Ms. Roche, Officer Hensley observed an unusual circular impression, approximately five centimeters in size, on the right hip. He noted a corresponding five centimeter area in the chassis of the Mercury automobile.

S.B.I. agent Mark Nelson came to the crime scene on the evening of 13 May at approximately 11:30 p.m. He made numerous tests and observations and stated his opinion that one particular bloody smear was consistent with the large bloody object, like

a body, being rolled or dragged down the slope of the field. He also examined the Mercury automobile and found blood in numerous places. He also performed tests on the vaginal and anal smears taken from Ms. Roche's body and found the presence of sperm.

Dr. Dana D. Copeland, a pathologist, conducted the autopsy on Ms. Roche on 14 May 1980. He observed cuts on the front part of her body, all parallel. The cuts were straight across and were of a uniform, shallow depth. The placement and uniform depth, in Dr. Copeland's opinion, indicated that the cuts had been made deliberately shallow and "with some care and effort." His conclusion was that Ms. Roche's cuts were caused by a sharp instrument like a knife. Dr. Copeland found numerous lacerations on her head and hands which were, in his opinion, produced by beating with a long, blunt instrument with a round striking surface. In addition to the numerous cuts and abrasions throughout Ms. Roche's body, her left leg was completely fractured and broken at the top. The pelvis was fractured and separated. Compression injuries in the pelvic region were consistent with her having been struck by an automobile. Severe internal bleeding had taken place and he found injuries in the vaginal area which, in his opinion, could have been produced by forcible sexual intercourse. Her right rib was also broken. In Dr. Copeland's opinion, Ms. Roche died as a result of loss of blood from the injuries she sustained. Moreover, his opinion was that she could have remained alive from a period of two hours up to a maximum of twenty-four hours after receiving the injuries observed.

At approximately 8:12 p.m. on 15 May 1980, Deputies Freddie Benson and Ted Lanier and Detective J. C. Holder of the Raleigh Police Department began interviewing the defendant.

Deputy Benson advised defendant of his Miranda rights and defendant signed a waiver of rights form. Defendant stated that he understood his rights. Deputy Benson left the room and Detective Holder began to question defendant. He again advised defendant of his rights and defendant was calm and in control. Detective Holder testified that "Johnny looked at me, and he said that he did it. He asked me if I was happy. I told him that I was not happy. I said, 'What did you do.' He said that he killed that girl." Defendant then proceeded to give Officers Holder and Lanier a complete statement.

Defendant's statement to the officers can be summarized as follows: On 12 May 1980 he was at a cookout on Stovall Drive and needed more beer. He borrowed the Mercury from Ms. Edwards and drove to the A & P Store on Western Boulevard where he purchased a bag of charcoal. Upon leaving the store he got into a fight with a black person and ran and hid until they left. He then went to an apartment complex on Avent Ferry Road and removed some money from the coin-operated laundry machines. As he drove down Avent Ferry Road he saw Ms. Roche walking and blew his horn. She waved, and he turned into the first dirt road, backed and turned, and sat headed toward Avent Ferry Road to await the girl. When Ms. Roche walked up to the car, he pinched her. She slapped him, and they began scuffling. He then apologized, and she said he had already hurt her arm. He asked her to go riding with him and she got into the car. A jogger came up during the scuffle and defendant told the jogger to keep his eyes on what he was doing. He and Ms. Roche then drove down Avent Ferry Road headed south and, after making a few turns, they eventually reached a wheat field. Defendant told her to get out of the car and "tried

to get into her pants." She resisted, and he told her he was going to have to get his "damn gun" from the vehicle, although, in fact, he did not have one. Defendant got a tire tool out of the trunk of the car, and Ms. Roche removed her pants. As she did so, he struck her on the side of the head and she fell to the ground. He then had forcible sexual intercourse with her. She tried to pull his hair, and he began to hit her some four or five times on the head and got blood on his face, shoulder, wrist and pants. According to defendant, he swung his knife at her and cut her on the face and neck, but he didn't mean to cut her. He then attempted anal intercourse, and when she resisted, he hit her again, and, instead of fighting, she just laid there bleeding. Defendant then got into his car and drove down to turn around. He could barely see over the steering wheel, but knew he had run over her with the car because he heard a thump and the car got stuck. He spun the tires to free the car and then drove home. When he arrived, the police were at the trailer. He returned to the cookout and explained the blood on his clothing and body as the result of the fight at the A & P.

At approximately 10:26 p.m. on 15 May 1980, defendant consented to a taped interview. Prior to this taking place, Officer Holder again advised defendant of his rights and defendant again repeated essentially the confession summarized above. Later that evening, defendant accompanied Detective Holder and other officers to the crime scene and showed them various items involved in the crime.

Defendant offered no evidence during the guilt determination phase of the trial.

Upon receiving the jury verdict finding defendant guilty of first degree murder, first degree rape, and kidnapping, the court convened the sentence determination phase of the trial before the same jury. The State offered no evidence during this phase, choosing to rely instead upon the evidence introduced at the guilt determination phase. The defendant presented evidence through his brother and sister, who described in detail their life with their parents. Their parents were violent and constantly drunk and beat their children frequently. Their father spent time in prison, and the children were placed in foster homes. Defendant was forced to begin drinking by his father before he was ten years of age and would get "stone-drunk." Defendant became a heavy drinker and drug user.

Dr. Bob Rollins, a specialist in forensic psychiatry, examined defendant and diagnosed defendant as having a mental disorder of emotionally unstable personality as a result of experiences during his formative years. Dr. Rollins also testified that defendant was able to proceed to trial in that he understood his legal situation and was able to cooperate with his lawyer. Dr. Rollins felt that defendant understood what he was charged with, the different pleas he might make and the possible consequences of the situation. He further testified:

> Mr. Rook just has never been able to make a satisfactory adjustment out in society, not been able to get along with people. He's been involved in violence, the longest he had ever been employed is three weeks; he can't get along with his own family, with his wife, or with anybody. He just doesn't have the capacity to do that.

Itwas also Dr. Rollins's opinion that defendant associates sexual

gratification with violence and aggressive acts and is sexually excited by violence and aggression. His opinion was that defendant, to some extent, "enjoys inflicting pain on other people." Dr. Rollins was of the opinion that defendant would not benefit from psychiatric treatment and believed that defendant's conduct would continue in the future in a manner similar to that of the past if he were to go free. In Dr. Rollins's opinion, defendant, at the time of the crime, was aware that what he was doing was wrong and that he would be held responsible for his actions. Chief District Court Judge George F. Bason of the Tenth Judicial District testified that during the years Mr. Rook was involved in the juvenile courts, no beneficial program was available to help him.

Dr. Seymour Halleck, a psychiatrist, testified that defendant's brutality probably resulted from his exposure to brutality himself as a child. He also testified that defendant suffered a mental illness although he was not insane. He stated:

> I base my opinion on the fact that anybody that uses as much alcohol and as many drugs as he has and who has this kind of history of so much deprivation, so little moral or social learning, but I'm primarily based it on the drug issue, anybody who uses these drugs cannot exercise rational judgment, anybody with a degree of alcoholism found in this family as the disease, this kind of alcoholism is definitely a disease.

Dr. Halleck agreed with Dr. Rollins that defendant would not benefit from psychiatric treatment for any brief period of time.

At the conclusion of the testimony, the trial court instructed the jury on the sentencing phase. Three aggravating circumstances were submitted to the jury: (1) whether the murder was committed while defendant was engaged in the commission of the rape of the victim; (2) whether the murder was committed

while the defendant was engaged in the commission of the kidnapping of the victim; and (3) whether the murder was especially heinous, atrocious or cruel. Sixteen mitigating circumstances were submitted to the jury.[1] The jury found beyond a reasonable

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[1]The mitigating circumstances submitted to the jury were:

(1) That this murder was committed while John William Rook was under the influence of mental or emotional disturbance.

(2) The capacity of John William Rook to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of John William Rook at the time of this murder is a mitigating circumstance.

(4) John William Rook, in his formative years, was subjected to cruelty and physical abuse by his parents.

(5) John William Rook, in his formative years, was subjected to mental abuse by his parents.

(6) John William Rook, in his formative years, was subjected to emotional abuse by his parents.

(7) John William Rook has been a loving and affectionate husband to his wife.

(8) John William Rook has been loving and affectionate to his brothers and sisters and their children.

(9) John William Rook is an alcoholic.

(10) John William Rook is an abuser of drugs and is addicted to drugs.

(11) John William Rook was sexually abused by an older man whom he lived with when he was 10 years old in order to have a more stable home environment.

(12) John William Rook had a deprived and chaotic childhood in which he was schooled in violence and criminality by his parents.

(13) John William Rook now has an IQ of 71 and received very little education in his formative years.

(14) John William Rook, in his formative years, received very little religious and moral training.

doubt each of the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The jury also found one or more mitigating circumstances, although it did not designate which of the sixteen were found, and then found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. The jury then returned a recommendation that the death penalty be imposed, and the court entered judgment imposing the death penalty for the crime of first degree murder. Defendant also received consecutive life sentences for the crimes of kidnapping and first degree rape. From these judgments, defendant appealed of right to this Court.

II.

PRE-TRIAL PHASE

Prior to trial, defendant entered several motions which were denied by the trial court. The denial of these motions provides the basis for four of defendant's primary contentions on this appeal. He first contends that the trial court erred in denying his motion to suppress custodial statements because the findings of fact of the trial court in the order were not supported by sufficient and competent evidence. He also contends that the trial court erred in ruling that his confession was voluntary in that it was obtained by the influence of hope or fear implanted

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(15) John William Rook confessed in detail as to what he did and cooperated with the detectives and investigators of the Raleigh Police Department and Wake County Sheriff's Department as to his involvement.

(16) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value

in his mind by the acts and statements of police officers during his custodial interrogation. Defendant also contends that his motion to suppress all evidence obtained as a result of the search warrant issued for the trailer on Stovall Street and the Mercury automobile should have been allowed because the record reveals insufficient facts or circumstances to support the finding of probable cause by the magistrate who issued the search warrant. Finally, defendant contends that his motion to dismiss the proceedings pursuant to G.S. 15A-2000 should have been allowed on the grounds that that section of our General Statutes is unconstitutional on its face and as applied to him. We discuss these contentions seriatim.

A.

As a result of defendant's motion to suppress his custodial statements, the trial court conducted an extensive voir dire hearing on the admissibility of the statements. Evidence was presented both by the State and defendant. Thereafter, the court entered extensive findings of fact and conclusions of law and denied the motion. With respect to the trial court's order, defendant first contends that certain findings of fact contained therein were not supported by substantial and competent evidence. We find no merit to this contention.

Defendant acknowledges the general rule in this jurisdiction that findings of fact made by the trial court following a voir dire hearing on the voluntariness of a confession are conclusive on appellate courts if supported by competent evidence in the record. State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 92 (1975). No reviewing court may properly set aside or modify

those findings if so supported. State v. Barber, 278 N.C. 268, 179 S.E. 2d 404 (1971). Indeed, a trial judge's findings will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence. State v. McRae, 276 N.C. 308, 172 S.E. 2d 37 (1970).

Here, the trial court found as a fact that "Lieutenant Benson advised the defendant that he was a G.D. liar, and then read a warrant to the defendant charging him with murder and advised him that he was being charged with murder."

Defendant admits the truth of this finding but contends, however, that it is incomplete. Defendant argues that this finding should include a statement to the effect that Benson stated that "He had good evidence against him [the defendant] and that he didn't go down to the magistrate and get warrants for first degree murder without good evidence against him." Defendant contends that the finding made by the trial court is not a fair and clear statement of the events transpiring on the evening of 15 May 1980 absent the language he would add. We disagree. While there is some evidence from the defendant on voir dire which supports his contention as to events transpiring during the interrogation, other evidence before the trial court on voir dire supports the finding as stated. Indeed, Detective Holder flatly denied that Detective Benson told the defendant that he had "good evidence" implicating the defendant. Detective Holder testified, "At the time Freddie [Benson] left the room he did not say anything to him other than calling him a liar." [Emphasis added.] Hence, the trial court's finding was supported by competent evidence, and there was no error in the failure of the trial court to make the extended finding

formulated by the defendant.

Defendant next contends that the following finding of fact was also not supported by competent evidence: "That Officer Benson spoke to the defendant in a loud but not an angry or threatening tone of voice." Defendant contends that the finding that the tone of voice used by Officer Benson during interrogation was not angry or threatening is not supported by evidence. Defendant primarily relies, in support of this argument, on the response of Detective Holder on cross-examination that, "Freddie Benson became very angry and upset at that time." We do not think the quoted testimony contradicts the trial court's finding that Benson's voice was not "angry or threatening." Immediately following the quoted testimony, Holder further testified that "Freddie Benson raised his voice. He didn't yell at him. He just raised his voice." Moreover, Benson himself testified that, "I used a loud tone of voice to tell him he was lying . . . I did not at any time threaten, make any promises or strike Mr. Rook when I was in the room." Immediately following this incident, Detective Benson left the room and took no further part in interrogation of the defendant. Thus, the trial court's finding that Detective Benson's tone of voice was loud but not angry is supported by evidence and is binding on this Court.

Defendant next objects to the following finding of fact: "Holder advised the defendant that neither he nor Officer Lanier could help him and that the only thing that could help him was to tell the truth." Defendant contends that while there is conflicting evidence as to what Detective Holder did in fact tell the defendant concerning helping him, it is clear that the tenor of Holder's conversation with defendant prior to his con-

fession was concern with giving him help for his drinking and drug problems. Defendant contends that Detective Holder "implicitly" promised to help the defendant. Again, we disagree. Even the defendant concedes that the evidence on this finding is "conflicting," and we find that the record reveals compelling evidence which supports the trial court's finding. Detective Holder testified:

> I told Johnny at that point, I said, Johnny, I can't help you. We cannot help you. The only thing that can help you is the truth. . . .
>
> I reemphasized the point that the only thing for him to do at that point was to tell the truth, that I could not help him, Mr. Lanier could not help him.
>
> . . . .
>
> . . . I told Johnny, I can't help you, Mr. Lanier cannot help you. The only thing that can help you is the truth. And that was it.
>
> . . . And, I told Johnny several times, I said Johnny, I can't help you.

Clearly, there is abundant evidence to support the trial court's finding.

Defendant next contends that the trial court erred in entering the following finding of fact:

> At no time did either officer advise or promise the defendant that he could or would be helped in court or with the District Attorney on the charges against him and offered no help to him with his alcoholic problems.

Defendant also contends that certain other findings similar to that quoted above regarding the offer of help to him with respect to his alcoholic problems are unsupported by evidence at the voir dire hearing. Defendant contends, as we address more fully in the next section of this opinion, that the evidence clearly shows that the defendant's confession was induced by an offer of help to keep him from receiving the death penalty and that, in return

for confessing, he was told that he would be sent to prison where he would receive help for his drinking and drug problems. All findings to the contrary, defendant contends, are unsupported by the evidence.

There is simply no merit to defendant's contentions in this regard. The record is replete with testimony to support all of the trial court's findings that no offer of help was made to defendant in order to induce him to make his confession. For example, Detective Holder testified:

> I never offered or advised Mr. Rook that he could be helped in court. I never advised that he could be helped with the District Attorney's Office with respect to these charges.
>
> . . . Neither me nor Mr. Lanier offered to help Mr. Rook with his alcohol problem specifically. He seemed to understand that if he went back to prison he could get this help. We did not promise him any help at all. I did not make any promises with respect to the charges pending against him.
>
> . . . .
>
> . . . I said, Johnny, is there anyone in this room, Mr. Lanier, myself and Miss Mobley, have they promised, have I promised or threatened you or put you under any pressure or coerced you in any way to make this statement. He said,no. . . .
>
> . . . .
>
> No one during the course of the interview touched Mr. Rook's person in any threatened manner, strike him, or do anything of that nature to him.

We hold, therefore, that each of the challenged findings of fact is supported by competent evidence in the record and is binding on this Court. Moreover, we have examined the remaining findings of fact in the order denying suppression of defendant's confession and find that each of them is supported by competent

evidence adduced at the voir dire hearing. These assignments of error are overruled.

B.

With respect to the trial court's order denying defendant's motion to suppress his custodial statements, defendant next contends that the trial court's findings of fact do not support its conclusion of law that his confession was vouluntarily and understandingly made. Defendant contends that the circumstances of his confession were such that the confession was obtained by the influence of hope and fear implanted in his mind by the acts and statements of police officers during his custodial interrogation.

As noted in the preceding section of this opinion, facts found by the trial court are conclusive on appellate courts when supported by competent evidence. Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate court. State v. Bishop, 272 N.C. 283, 158 S.E. 2d 511 (1968). Hence, whether the conduct and language of the investigating officers amounted to such threats or promises or influenced the defendant by hope and fear as to render the subsequent confession involuntary is a question of law, as defendant contends, reviewable on appeal. State v. Fox, 274 N.C. 277, 163 S.E. 2d 492 (1968); State v. Biggs, 224 N.C. 23, 29 S.E. 2d 121 (1944). Even where the procedural safeguards required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1968), are recited by the officers and defendant signs a waiver stating that he understands his constitutional rights, including his right to counsel, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in

fact voluntarily and understandingly given. The fact that the technical procedural requirements of Miranda are demonstrated by the prosecution is not, standing alone, controlling on the question of whether a confession was voluntarily and understandingly made. The answer to this question can be found only from a consideration of all circumstances surrounding the statement. State v. Bishop, 272 N.C. 283, 158 S.E. 2d 511; accord, Davis v. North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966); State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 92.

Our inquiry, therefore, is whether the facts revealed by the record before us indicate that the challenged confession was obtained by the influence of hope or fear implanted in defendant's mind by the acts and statements of the police officers during defendant's custodial interrogation. The long-standing rule in this jurisdiction was stated by Chief Justice Taylor in State v. Roberts, 12 N.C. (1 Dev.) 259, 260 (1827):

> The true rule is, that a confession cannot be received in evidence, where the Defendant has been influenced by any threat or promise; for, as it has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotions of hope or fear, ought to be rejected.

Justice Henderson, concurring, set forth the rule which we have followed since:

> Confessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man, cannot be counter-vailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope, or exhorted by fear, are, of all kinds of

> evidence, the least to be relied on, and are therefore entirely to be rejected. . . .

Id. at 261-62. In State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 92, Justice Branch, now Chief Justice, noted the rules quoted above and summarized the numerous cases decided by this Court involving various factual backgrounds on this question. Here, defendant relies on Pruitt to support his contention that his confession was obtained by the influence of hope and fear. We think, however, that his reliance on Pruitt is misplaced. In Pruitt, the interrogation of defendant by three police officers took place in a "police-dominated atmosphere." The evidence was uncontradicted that the officers repeatedly told defendant that they knew he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Such circumstances, this Court held, gave rise to the inference that the language used by the officers tended to provoke fright. Such language was then tempered by statements that the officers considered defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." These "flattering" statements were capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Justice Branch concluded, "Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, i.e., confess." Id. at 458, 212 S.E. 2d at 102.

Here, there is no evidence of any oppressive environment in the room where defendant was interviewed. It was a normal interview room at the Wake County Courthouse, approximately eight

feet by fifteen feet, with a table and chairs and lighted by normal ceiling lights. Initially, there were three officers in the room when defendant was read his rights, but the evidence indicates that no more than one officer talked with him at a time. Detective Benson left the room shortly after the rights were read and Detective Holder became the sole questioner. Officer Lanier asked questions only after defendant had confessed. We have held on numerous occasions that a confession is not made inadmissible merely because it is made to officers of the law, or because defendant was in jail, or under arrest, or because it was given in response to questioning. E.g., State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 92; State v. Smoak, 213 N.C. 79, 195 S.E. 72 (1938).

Moreover, there is no evidence that defendant was subjected to any threats or suggested violence or show of violence to persuade or induce him to make a statement. Indeed, the evidence that was presented showed that no threats were made to the defendant, nor was he touched or struck in any manner. As discussed in the preceding section of this opinion, there is ample and competent evidence to support the trial court's findings that "Officer Benson spoke to defendant in a loud but not angry or threatening tone of voice."

Defendant apparently relies primarily, in attacking the voluntariness of his confession, on the argument that he was "induced" to make his statement by an offer of "help" from Detective Holder. As discussed in the preceding section of this opinion, however, we find competent evidence to support the trial court's finding that no such "help" was offered. Moreover, the record is clear that all talk of "help" emanated from the defendant

himself. At each juncture when defendant mentioned that he "needed help" with his alcohol problem, Officer Holder was quick to tell him that he could not help him. The evidence overwhelmingly supports the trial court's finding of fact and conclusion of law that the officers did nothing to induce defendant's confession through hope or fear. The situation here is more similar to that in State v. Small, 293 N.C. 646, 239 S.E. 2d 429 (1977). In Small, the uncontradicted evidence showed that one of the officers had told the defendant that he could not "buy" one of defendant's statements and that defendant should tell the truth. This Court held that such statements "do not constitute a persuasive showing that defendant's will was overborne by these acts of the police officers." Id. at 653, 239 S.E. 2d at 435.

Finally, we reiterate the rule stated in Pruitt that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, and not to any mere collateral advantage. Here, all discussions concerning any "help" for defendant were centered around defendant's drinking and family problems. Clearly, these are matters entirely collateral to the criminal charges against him.

This Court has consistently followed the rule enunciated by Justice Henderson in his Roberts concurrence. In Pruitt, we summarized numerous cases demonstrating this Court's adherence to that rule. We have made it equally clear, however, that custodial admonitions to an accused by police officers to tell the truth, standing by themselves, do not render a confession inadmissible. State v. Thomas, 241 N.C. 337, 85 S.E. 2d 300 (1955); State v. Thompson, 227 N.C. 19, 40 S.E. 2d 620 (1946); State v.

Thompson, 224 N.C. 661, 32 S.E. 2d 24 (1944). Such custodial admonitions to tell the truth are all we find from the record before us. Here, as discussed in the preceding section of this opinion, there was ample evidence to support the trial judge's findings that defendant's confession was not coerced, and the findings in turn support his conslusion that the incriminating statement was made voluntarily and knowingly. We hold that the confession was properly admitted into evidence.

C.

Prior to trial, defendant moved for the exclusion of all evidence obtained as a result of the search of the trailer where the defendant lived and all evidence obtained as a result of the search of the Mercury automobile on the ground that there was not probable cause for the issuance of the search warrant. The searches resulted in the seizure of certain bloody clothing which was introduced into evidence against defendant. Defendant attacks the search warrant in question on the grounds that (1) the application for the search warrant failed to contain sufficient facts and circumstances to indicate that the items sought constituted evidence of any crime, and (2) that the search warrant failed to contain sufficient facts or circumstances to indicate that the items would be in the trailer in question.

These arguments are governed by well-established legal principles. The probable cause required by the fourth amendment and G.S. 15A-243-245 is simply:

> a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. [Citation omitted.] Thus, the

> affidavit upon which a search warrant is issued is sufficient if it "supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender."

State v. Riddick, 291 N.C. 399, 406, 230 S.E. 2d 506, 511 (1976) (quoting State v. Vestal, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971), cert. denied, 414 U.S. 874 (1973)). Accord, State v. Jones, 299 N.C. 298, 303, 261 S.E. 2d 860 (1980). Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances, and each case must be decided on its own facts. Reviewing courts will pay deference to judicial determinations of probable cause, Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); State v. Louchheim, 296 N.C. 314, 250 S.E. 2d 630, cert. denied, 444 U.S. 836 (1979); "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants,"United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684, 689 (1965). A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched. State v. Edwards, 286 N.C. 162, 209 S.E. 2d 758 (1974); State v. Campbell, 282 N.C. 125, 191 S.E. 2d 752 (1972). With these principles before us, we review the search warrant and the affidavit upon which it was obtained.

An examination of the application, prepared by Officer Bissette, indicates that the items sought included "a wooden

club or instruments that could be used as a club, bloody clothing, and other instrumentalities of the crime," which was stated to be "rape, kidnapping, murder." In this connection, the application contained an affidavit from Officer Bissette which averred:

> On May 15, 1980, at 4:30 p.m., the vehicle, a 1972 Mercury, N.C. license # RAP-980, that the murder victim, Ann Marie Roche, was seen being forced into on May 12, 1980, was located at Stovall Drive Raleigh, N.C. The person in control of the vehicle, Ruby Howell, states that it is her mother's car and that she drives it and keeps it all the time. She states that on Monday, May 12, 1980, her neighbor, Johnny Rook, who lives at Lot 15, College View Trailer Park, 1508 Stovall Drive, borrowed the car at 5:45 p.m. and returned the car about two hours later. At the time he returned the car he had fresh cut marks on his face and blood on his arms. Johnny Rook is a white male with long blond hair that he wears in a pony tail. At the time he borrowed the car he was dressed in blue jeans and shoes only. . . . The murder victim was seen being forced into this car at 7:30 p.m. on Avent Ferry Road at Lake Raleigh Road by a white male wearing only blue jeans and shoes and using an object appearing to be a club to beat the victim. Her body was found on May 13, 1980 approximately one-fourth mile from this intersection nude with massive head and body injuries.

The information contained in this affidavit clearly establishes probable cause to believe that a "wooden club or instruments that could be used as a club" and "bloody clothing" constituted evidence of the crimes being investigated, that a club, or an object appearing to be a club, was in the possession of defendant and was used as an instrumentality in committing the crime being investigated, and that "bloody clothing" would constitute evidence of the offenses committed or would reveal the identity of a person participating in those offenses. Additionally, the items sought to be discovered were sufficiently described to

enable officers to identify them.

Defendant argues, however, that the application for the search warrant failed to allege sufficient facts or circumstances which would indicate that the items sought would be discovered in the trailer to be searched. We disagree. The portion of the application dealing with this issue reads:

> Ruby Howell states . . . that on Monday, May 12, 1980, her neighbor, Johnny Rook, who lives in Lot 15, College View Trailer Park, 1508 Stovall Drive, borrowed her car at 5:45 p.m. and returned the car about two hours later. . . . At the time he borrowed the car he was dressed in blue jeans and shoes only. She stated that after he returned the car he went to Lot 15, his residence in the park. He lives in this trailer in the first bedroom on the right. The trailer is rented by Barry E. Staton. Johnny Rook has access to the entire trailer, according to a statement of Barry E. Staton. . . .

These facts or circumstances, in our opinion, supply reasonable cause to believe that the club-like object and the bloody clothing would be found on the premises to be searched.

The affidavit upon which the probable cause determination was based contained specific, and not purely conclusory, allegations and stated underlying circumstances upon which the affiant's belief of probable cause was founded. Clearly, there were facts and circumstances in the affidavit implicating the premises to be searched. A practical assessment of the information before the magistrate would clearly allow a reasonable person to conclude that the information contained in the application was credible and that the proposed search would reveal, upon the premises to be searched, the presence of the objects sought and that those objects would aid in the apprehension or conviction of the offender. Issuance of the search warrant by the magistrate on the information available to him was, under the law of this State, clearly

justified.

D.

By this assignment defendant challenges the constitutionality of G.S. 15A-2000(e), the provision governing the submission of aggravating circumstances in the penalty phase of a first degree murder trial, both on its face and as applied in this case. The exceptions on which this assignment is based challenge the trial court's denial of defendant's pre-trial motion to dismiss the penalty phase proceedings and the trial court's entry of judgment imposing the death penalty upon the jury's recommendation.

Defendant contends that the list of permissible aggravating circumstances violates the eighth and fourteenth amendments to the United States Constitution in that the circumstances listed are vague and overlapping and may cause the jury arbitrarily and capriciously to impose the death penalty. Defendant acknowledges that this Court has considered the issue of the constitutionality of G.S. 15A-2000(e) and has decided the issue adversely to him, State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), cert. denied, 448 U.S. 907 (1980), but requests that we reconsider that ruling. We are not so inclined.

In Barfield, the defendant challenged the constitutionality of the statutorily defined aggravating circumstances as "vague and without definition." In rejecting this claim this Court, per Justice Britt, noted:

> Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which

> society has judged to warrant the application of the criminal sanction. See Gregg v. Georgia, 428 U.S. at 194-195, 49 L. Ed. 2d at 886-887, 96 S. Ct. at 2935. While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a fact finder in any lawsuit. See Proffitt v. Florida, 428 U.S. at 257-258, 49 L. Ed. 2d at 926, 96 S. Ct. at 2969. The issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are given appropriate instructions by the trial court judge. See Jurek v. Texas, 428 U.S. at 279, 49 L. Ed. 2d at 939, 96 S. Ct. at 2959 (White, J., concurring).

Id. at 353, 259 S.E. 2d at 543. We adhere to this reasoning and reaffirm our holding that the aggravating circumstances listed in G.S. 15A-2000(e) are not so vague as to violate due process or to allow a jury arbitrarily and capriciously to impose the death penalty. This assignment of error is overruled.

Defendant specifically challenges the constitutionality of the statutory aggravating circumstance of the capital felony being "especially heinous, atrocious or cruel," G.S. § 15A-2000(e)(9)(1978), in that it requires a subjective evaluation of the evidence by the jurors. We disagree. This argument was rejected by this Court in State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979). In Goodman, we recognized that while the United States Supreme Court has found a statute employing similar language to be unconstitutional because it allowed the jury too much latitude, Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), that Court has upheld similarly worded statutes whose meaning has been carefully limited by judicial construction, Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1978). Accordingly, in Goodman we

interpreted our statutory aggravating circumstance of "heinous, atrocious or cruel" as "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'" id. at 25, 257 S.E. 2d at 585 (quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)), the same interpretation approved by the United States Supreme Court in Proffitt, 428 U.S. at 255-56, 96 S. Ct. at 2968, 49 L. Ed. 2d at 924-25. Based on our reasoning in Goodman and that of the United States Supreme Court in Proffitt, we once again affirm the constitutionality of this aggravating circumstance.

Nor do we think that the trial court's instructions on this aggravating circumstance were so vague as to violate due process. With regard to this factor, the trial court told the jury:

> Now, I instruct you, members of the jury, that in this context heinous, as that word is used, means extremely wicked or shockingly evil. Atrocious, as used there, means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been explained to you, this murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing.
>
> The murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

This instruction accords with the construction of G.S. 15A-2000(e)(9) adopted in Goodman, and its submission to the jury was proper on

the evidence in this case. The evidence summarized in Section I of this opinion reveals the most gruesome murder imaginable and is sufficient to allow the jury to find that this was a "conscienceless or pitiless crime which was unnecessarily torturous to the victim."

Defendant further contends, however, that the decision of the United States Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), compels a reversal of our holding in Goodman. We disagree. In Godfrey, both victims died instantly from a gunshot wound to the head. The aggravating circumstance of the crime being "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," was submitted by the trial court and approved by the Georgia Supreme Court. The United States Supreme Court reversed the death sentence, holding that the Georgia Supreme Court had failed to be consistent in its interpretation of this aggravating circumstance. In earlier decisions, the Georgia Supreme Court had interpreted this aggravating circumstance to require a showing of torture or aggravated battery to the victim. In the case of the Godfrey murders, the victims died instantly and the United States Supreme Court reasoned that "There is no principled way to distinguish this case, in which the death sentence was imposed, from the many cases in which it was not." Id. at 433, 100 S. Ct. at 1767, 64 L. Ed. 2d at 409.

This Court has avoided the problem presented by Godfrey by holding that this aggravating circumstance does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering on the victim. State v. Goodman,

298 N.C. 1, 24-26, 257 S.E. 2d 569, 585; accord, State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981). The instructions given by the trial judge here accorded with this interpretation and the evidence revealed by the record supports the submission of this aggravating circumstance to the jury. The record shows aggravated battery of the victim amounting to torture which necessarily caused her great physical pain and emotional distress. Thus, we hold that the instruction given complied with constitutional requirements and that the submission of the aggravating circumstance that the murder was especially heinous, atrocious or cruel was proper.

We conclude that the statutory scheme for determining the sentence in a capital case, G.S. § 15A-2000, is neither unconstitutional on its face nor as applied to this defendant.

III.

GUILT PHASE

Defendant next contends that the trial court erred in denying his motion to dismiss the charge of murder in the first degree based on premeditation and deliberation. In presenting this contention, defendant argues that the evidence from the pathologist and the defendant's statement establish (1) that Ms. Roche did not die immediately from any one blow or injury but from blood loss resulting from all of her injuries; (2) that the injuries to Ms. Roche's head were caused by defendant's hitting her with a tire tool; (3) that the injuries to her leg were caused by defendant's running over her with his automobile; and (4) that the exculpatory statements in his confession introduced by the State clearly established that he did not mean

to strike Ms. Roche with the knife nor did he mean to run over her with the automobile. Defendant strongly urges that his own statement was the only evidence introduced by the State as to how Ms. Roche was injured and how she ultimately died and that there was no evidence contradictory to the defendant's statement that he did not mean to strike her with the knife or run over her. Hence, defendant argues that the State, by introducing his confession in which he claimed that the knife and automobile injuries were accidental, is bound entirely by the truth of such statements and that although the submission of the murder charge was proper under the felony murder rule, it was not proper under the theory of premeditation and deliberation. This is significant, defendant notes, because if submission of the murder charge were proper only under the felony murder rule, then rape should not have been submitted to the jury as an aggravating factor in the sentencing phase under State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979), cert. denied, 446 U.S. 941 (1980). Had that aggravating factor not been submitted to the jury, defendant contends, the jury might possibly have found that the numerous mitigating circumstances outweighed the aggravating factors and would have recommended life imprisonment.

In presenting this argument, defendant is relying primarily on the principle of law enunciated by this Court in State v. Carter, 254 N.C. 475, 119 S.E. 2d 461 (1961). There, this Court stated:

> When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the statements. [Citations omitted.]

> And when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed.

Id. at 479, 119 S.E. 2d at 464.

The principle has remained viable in this jurisdiction. Defendant has, however, ignored other rules which must be applied by this Court in reviewing the trial court's denial of the motion to dismiss. It is likewise the rule in this jurisdiction that the introduction by the State of a statement of the defendant which includes exculpatory assertions does not prevent the State from showing facts which contradict the exculpatory statements. Moreover, on motions to dismiss, only evidence favorable to the State is considered. State v. Witherspoon, 293 N.C. 321, 237 S.E. 2d 822 (1977). Put another way, the State is not bound by the exculpatory portions of a confession which it introduces if there is "other evidence tending to throw a different light on the circumstances of the homicide." State v. Bright, 237 N.C. 475, 477, 75 S.E. 2d 407, 408 (1953).

This Court answered a similar argument in State v. May, 292 N.C. 644, 235 S.E. 2d 178, cert. denied, 434 U.S. 928 (1977). There, it was said:

> Defendant assigns as error the failure of the trial court to enter judgment as of nonsuit at the close of all the evidence. Specifically, the defendant contends that he comes within the purview of the rules stated in State v. Carter, 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961), that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." See also State v. Bolin, 281 N.C. 415, 189 S.E. 2d 235 (1972). However, the introduction by the State of an exculpatory statement made by a defendant does not preclude the State from showing the facts concerning the crime to be different, and does not

> necessitate a nonsuit if the State contradicts or rebuts the defendant's exculpatory statement. . . .

Id. at 658, 235 S.E. 2d at 187 (emphasis added).

We find the emphasized portion of the rule cited from May applicable here. Crucial to defendant's contention is his insistence that the cause of Ms. Roche's death was injury suffered at his hands which he states in his confession he did not "mean to" inflict. He relies on the pathologist's testimony that all the injuries together caused her death to support his argument. A close reading of Dr. Copeland's testimony, however, indicates that he stated only that "none of the injuries taken together or acting singularly would have produced immediate death." (Emphasis added.) He also testified that the two injuries which were significantly severe to produce the blood loss causing death were the injuries to the thigh due to the broken leg and the injuries to the head. There is nothing in the defendant's confession which implies that he did not intend to strike the victim about the head area with the tire tool, and defendant does not so contend on appeal. Indeed, defendant confessed to striking the victim with the tire tool prior to sexually assaulting her and that he continued to beat her thereafter. Defendant obtained the tire tool from the trunk of the vehicle because the victim was resisting defendant's sexual assaults, presumably to gain her submission. Such forethought and execution constitute premeditation and deliberation. It is clear from the pathologist's testimony that the injuries to the head area significantly contributed to the victim's blood loss and ultimate death and from defendant's own statement that these injuries were deliberately inflicted. This evidence, taken in the light most favorable to

the State, sufficiently shows premeditation and deliberation to withstand defendant's motion to dismiss.

Other evidence gleaned from the record tends "to throw a different light on the circumstances of the homicide," State v. Bright, 237 N.C. at 477, 75 S.E. 2d at 408. Defendant's statement that he did not "mean to hit her" with the knife is contradicted by competent circumstantial evidence. From the placement, depth and straight lines of the cuts on the upper body, the pathologist concluded "that they were made in an intentionally superficial manner. . . . [Such a cut] is made deliberately shallow with some care and effort . . . ."

Moreover, physical evidence obtained by the officers from the murder scene substantially contradicts defendant's assertion that he did not "mean" to run over the victim. It is unnecessary to repeat that evidence here. Suffice it to say that the location of the victim's body in relation to the pile of clothing and the size of the field in which these brutal acts took place seriously challenge defendant's assertion that he accidentally ran over the victim.

In another case in which the defendant attacked the sufficiency of the evidence to support a jury finding of premeditation and deliberation, we recently stated:

> In the instant case, the State presented evidence tending to show that defendant choked the deceased, pushed her out of the car, and ran over her several times. The requisite premeditation and deliberation could be inferred from the brutal nature of the assault, the use of grossly excessive force or the "dealing of lethal blows after the deceased had been felled." [Citations omitted.] We hold that there was plenary evidence to support a jury finding that the defendant killed Ms. Grossnickle with premeditation and deliberation.

State v. Ferdinando, 298 N.C. 737, 741-42, 260 S.E. 2d 423, 426 (1979).

We hold, in the instant case, that the State submitted abundant evidence to support the trial court's denial of defendant's motion to dismiss the murder charge on the theory of premeditation and deliberation.

IV.

SENTENCING PHASE

Defendant assigns two errors to the sentencing proceedings. He first argues that the trial court erred in submitting the felony of rape as an aggravating circumstance during the sentencing determination phase and, secondly, that the trial court erred in failing to instruct the jury to indicate which of the mitigating circumstances it found to exist. We discuss these contentions seriatim.

A.

Defendant contends that the trial court erred in submitting the underlying felony of rape as an aggravating circumstance in his sentencing hearing and that he should not have been sentenced for the crime of rape even though the jury found him guilty of murder under both the theories of premeditation and deliberation and felony murder. We considered this question in State v. Goodman, 298 N.C. 1, 267 S.E. 2d 569 (1979), and held that when the defendant has been convicted of first degree murder on both the premeditation and deliberation and the felony murder theories, the inclusion of the underlying felony as an aggravating circumstance is proper. The commission of the "underlying" felony is not an essential element of the crime of premeditated

murder and, thus, is not the "automatic" aggravating circumstance which we held in Cherry to be impermissible. See State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979). Because this defendant was found guilty of first degree murder under both theories, there was no error in submitting the rape as an aggravating circumstance.

Likewise, Goodman answers defendant's contention that he should not have been sentenced on the rape offense. There, we said:

> [D]efendant contends that he was improperly sentenced for the offenses of kidnapping and armed robbery as those offenses merged with the murder conviction. As we have already said, no merger of the felony occurs when the homicide conviction is based upon the theory of premeditation and deliberation. [Citation omitted.] Defendant was found guilty by virtue of premeditation and deliberation as well as by application of the felony-murder rule. Thus, the court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the crimes of armed robbery and kidnapping.

State v. Goodman, 298 N.C. at 20, 257 S.E. 2d at 582 . Here, therefore, the trial court properly sentenced defendant for the crime of rape. These assignments of error are without merit.

B.

Defendant next contends that the trial court erred in failing to provide a space on the "Issues and Recommendation As to Punishment" form for the jury to list which of the specific mitigating circumstances it found or did not so find. Defendant believes that, since the aggravating factors must be specifically answered, the mitigating factors should be specified also. Defendant contends that failure to list which mitigating factors were found or not found impairs this Court's ability to give appropriate review to the sentencing phase of the case. While

defendant makes a good argument that it is the better practice, and we agree, /to require the jury to specify mitigating factors found and not found for the benefit of this Court in reviewing the appropriateness of the death penalty, we find no such requirement in our statutes.

G.S. 15A-2000, which sets out the procedures for the sentencing phase in a capital case, requires that the jury indicate in writing which of the statutory aggravating circumstances it finds beyond a reasonable doubt. G.S. § 15A-2000(c)(1)(1978). There exists no corresponding requirement regarding the mitigating circumstances considered by the jury. Instead, in recommending the death penalty the jury is required to state in writing only whether the mitigating circumstances found are insufficient to outweigh any aggravating circumstances found. G.S. § 15A-2000(c)(3)(1978). Thus, when this Court reviews the death sentence on appeal, we will have before us, by virtue of the requirements of the statute, a list of the aggravating circumstances submitted and those found, a list of the mitigating circumstances submitted, and a statement that any mitigating circumstances found are insufficient to outweigh the aggravating circumstances. Although some records presented to this Court have indicated which mitigating circumstances were found by the jury,[2] such information is not required

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[2]The records in the following cases included specific findings on the mitigating circumstances submitted to the jury:

State v. Hamlette, 302 N.C. 490, 276 S.E. 2d 388 (1981); State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981); State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981); State v. Small, 301 N.C. 407, 272 S.E. 2d 128 (1980); State v. Detter, 298 N.C. 604, 260 S.E. 2d 567 (1979); State v. Johnson, 298 N.C. 355, 257 S.E. 2d 597 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E. 2d 391 (1979); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979),

to be presented by G.S. 15A-2000(d). Thus, if there exists a requirement of specific findings on the mitigating circumstances submitted, it must arise from a constitutional guarantee.

In Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the United States Supreme Court upheld the Georgia statutory scheme for imposition of the death penalty in the face of a constitutional attack because, in its opinion, the Georgia procedure provided a reliable safeguard against arbitrary, excessive and disproportionate death sentences by limiting and guiding the jury's discretion and by providing automatic appellate review of all aspects of the sentencing.

The Georgia procedure is similar to our own statutory scheme. In Georgia courts, once guilt has been determined, the same jury (unless the jury is waived by the defendant) hears evidence concerning the circumstances of the crime and the criminal before making a recommendation as to the sentence. In reaching a sentence recommendation, the jury considers any mitigating circumstances and aggravating circumstances which it finds to exist. Georgia law does not enumerate what circumstances constitute mitigating factors but, instead, allows the jury to determine whether any facts proved at the sentencing hearing mitigate against imposition of the death penalty, limited only by the requirement that the mitigating circumstance be "authorized by law." Ga. Code Ann. § 27-2534.1 (1978). Furthermore, the trial court in its charge to the jury need not single out specific

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cert. denied, 446 U.S. 941 (1980); State v. Johnson, 298 N.C. 47, 259 S.E. 2d 752 (1979); State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979); State v. Jones, 296 N.C. 495, 251 S.E. 2d 425 (1979).

mitigating circumstances. Spivey v. State, 241 Ga. 477, 246 S.E. 2d 288, cert. denied, 439 U.S. 1039 (1978); Potts v. State, 241 Ga. 67, 243 S.E. 2d 510 (1978). With regard to mitigating circumstances, it is enough that the jury be told to "consider all evidence submitted in both phases of the trial in arriving at your verdict, including any and all evidence of mitigating circumstances." Collier v. State, 244 Ga. 553, 568-69, 261 S.E. 2d 364, 376 (1979), cert. denied, 445 U.S. 946 (1980). This is so even though aggravating circumstances must be submitted to the jury in writing. Id. Like the North Carolina statute, the Georgia statute requires the jury to return specific findings only as to the aggravating circumstances submitted. Ga. Code Ann. § 27-2534.1(c).

On appeal, the Georgia Supreme Court is required to review the sentencing procedure to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Ga. Code Ann. § 27-2537(c)(1978). Thus, because the Georgia statute requires specific findings only on aggravating circumstances, appellate review of the above-listed issues is limited to a consideration of the facts of the crime and the aggravating circumstances found by the jury.

As stated above, the United States Supreme Court has examined the Georgia procedure for imposition of the death penalty and found it to be constitutional. Gregg v. Georgia,

428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859. Our statutory scheme is strikingly similar to Georgia's, in that our sentencing review is limited to a consideration of the circumstances of the crime and the aggravating circumstances found by the jury. Georgia's scheme has been fully reviewed by the United States Supreme Court and has been declared constitutional; our statute is likewise constitutional. It follows, then, that there exists no constitutional requirement of specific findings on mitigating circumstances and that failure of the trial court to instruct the jury to make specific findings was not error.

We recognize that in Florida the jury, acting in a purely advisory role, must return specific findings as to both aggravating and mitigating circumstances regardless of what sentence it recommends and that the trial judge must make specific findings on both in writing before he determines the sentence. Fla. Stat. Ann. § 921.141 (Supp. 1980). This requirement, however, is imposed by the Florida statute and the Florida courts have never considered whether the deletion of the requirement for mitigating circumstances would render its procedure unconstitutional.

The State's contention is that it is unquestioned that our statutes and constitution require the jury specifically to indicate its finding on each aggravating circumstance submitted because such procedure provides an exercise of guided discretion to the jury. However, the State believes that the import of our previous decisions is that the jury should remain absolutely unfettered when it comes to considering mitigating circumstances. A requirement that the jury indicate its finding on each mitigating circumstance so submitted to them might, the State contends, unduly constrain the defendant. Requiring the jury to submit in

writing which mitigating factors are found, may, the State argues, inhibit the jury and prevent them from considering "other mitigating circumstances." See Collier v. State, 244 Ga. 553, 261 S.E. 2d 364. The State's contentions in this respect are not without some persuasion.

We hold that a proportionality review which considers both the circumstances of the murder, the aggravating circumstances found by the jury, and the mitigating circumstances submitted with those in other relevant cases satisfies constitutional requirements and adequately protects against arbitrary, capricious, excessive or disproportionate imposition of the death penalty.

Even were we to accept defendant's argument, we perceive no prejudice to defendant here. Even assuming that the jury accepted all sixteen mitigating circumstances submitted as true,[3] we still could not conclude that the death sentence was arbitrary, excessive or disproportionate. The circumstances of this murder are cruel and gruesome almost beyond belief: a young female, a stranger to the defendant, was stopped while walking home in a residential area while it was still daylight. Almost immediately, defendant began beating her and pulling her around by her hair. He forced her into his car and drove to a deserted field. There, by his own admission, he beat her and cut her with a knife until he gained her submission. Then, he raped her and when he was through, left her to die from her wounds, slowly bleeding to death. The jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

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[3]See note 1 supra.

We are unable to disturb the jury's finding and to conclude otherwise. In summary, we find no statutory provision to support defendant's contention nor do we find such a constitutional requirement. Even if any authority could be found to support defendant's claim, his assignment would be of no avail because he is unable to demonstrate any prejudice whatsoever.

V.

In addition to the aggravating circumstance submitted to the jury as argued in Section IV A. of this opinion, we have also reviewed the other aggravating circumstances presented to the jury in view of the penalty imposed. We conclude that the trial court properly submitted each of these aggravating circumstances. See State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510; State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569; State v. McDowell, 301 N.C. 219, 271 S.E. 2d 286 (1980), cert. denied, _____ U.S. ____, 101 S. Ct. 1731, 68 L. Ed. 2d 220 (1981).

G.S. 15A-2000(d) directs this Court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Martin, 303 N.C. 246, 278 S.E. 2d 214 (1981); State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286; State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510. This mandate serves as a check against the capricious or random imposition of the death penalty. State v. Hutchins, _____ N.C. _____, 279 S.E. 2d 788 (1981). Our

review function in this regard is limited to those instances where both phases of the trial of the defendant in a capital case have been found to be free from prejudicial error. State v. Goodman, 298 N.C. at 35, 257 S.E. 2d at 590-91. In exercising our role in the statutory scheme, we must be sensitive not only to the mandate of the Legislature, but also to the constitutional dimensions of our review. See Gregg v. Georgia, 428 U.S. at 204-206, 96 S. Ct. at 2939-2940, 49 L. Ed. 2d at 892-893; Proffitt v. Florida, 428 U.S. at 258-259, 96 S. Ct. at 2969-2970, 49 L. Ed. 2d at 926-927.

We consider the responsibility placed upon us by G.S. 15A-2000(d)(2) to be as serious as any responsibility placed on an appellate court. We have, therefore, carefully reviewed the record in this case along with the briefs and oral arguments presented. We conclude that there is sufficient evidence in the record to support the jury's finding as to the aggravating circumstances which were submitted to it. Moreover, as stated above, we find nothing in the record which indicates that the sentence of death was imposed under the influence of passion, prejudice, and any other arbitrary factor.

The record reveals that this defendant committed the most brutal, vile and vicious crime against Ann Marie Roche. Defendant beat Ms. Roche viciously with a tire tool, repeatedly cut her with a knife, ravaged her body in rape, ran over her battered body with an automobile and left her to bleed to death in a lonely field. Defendant's sadistic and bloodthirsty crimes committed against this victim compel the conclusion that the sentence of death is not disproportionate or excessive, considering

both the crime and the defendant. We, therefore, decline to exercise our discretion to set aside the death sentence imposed.

In all phases of the trial below, we find

No error.

Justice Exum concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case. Being of the opinion, however, that it was prejudicial error for the trial court to permit the jury to return its recommendation for a sentence of death without specifying which of the mitigating circumstances it found to exist, I vote to remand the case for a new sentencing hearing. This practice violates G.S. 15A-2000 and seriously prejudices the defendant not only at trial but also on appeal when this Court is required to determine whether his capital sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," or whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2).

Properly read G.S. 15A-2000 requires the jury to indicate its findings as to each mitigating circumstance submitted to it. Although the statute does not expressly and specifically so require, when the statute is read contextually, it becomes clear that the legislature intended that the jury specify both the aggravating and mitigating circumstances which it finds to exist in a capital trial. It is our duty to construe G.S. 15A-2000 so that the result comports with the overall design

and purpose of the statutory scheme even though the construction may go somewhat beyond the express language of the statute itself. See, e.g., State v. Silhan, 302 N.C. 223, 275 S.E. 2d 450 (1981); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979), cert. denied, 446 U.S. 941 (1980); State v. Johnson, 298 N.C. 47, 257 S.E. 2d 597 (1979); State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979). We said in State v. Johnson, supra, 298 N.C. at 56, 257 S.E. 2d at 606, with reference to G.S. 15A-2000:

> "We must construe important provisions of the statute. The first maxim of statutory construction is to ascertain the intent of the legislature. To do this this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." (Emphasis original.)

Section (b) of the statute requires, first, that in all capital cases:

> "[T]he judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> "After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

must consider

list

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life." (Emphasis supplied.)

Section (c) provides:

"(c) Findings in Support of Sentence of Death.—When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found." (Emphasis supplied.)

Section (e) then lists the available aggravating circumstances, and section (f) suggests a number of mitigating circumstances which the jury may consider but to which it is not limited because of the open-ended language found in section (f)(9).

The statute thus requires that "a written list of issues relating to" the aggravating and mitigating circumstances be submitted to the jury. The jury, before it may recommend a sentence

of death, must specify in writing which aggravating circumstances it finds beyond a reasonable doubt; that these circumstances are sufficiently substantial to call for the imposition of the death penalty, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Thus, as we noted in State v. Johnson, supra, 298 N.C. 47, 257 S.E. 2d 597, the statutory process is, as it must be, "directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the necessity of balancing them against each other in determining whether to impose the death penalty." Id. at 63, 257 S.E. 2d at 610.

Since the mitigating circumstances are required to be submitted, like the aggravating circumstances, to the jury in the form of "written . . . issues" and the jury is required to find whether "sufficient" aggravating and "sufficient" mitigating circumstances exist and since the jury is further required to show in writing which of the aggravating circumstances it finds, the conclusion is inescapable that the legislature intended the jury should also be required to show in writing which of the mitigating circumstances it finds to exist. What other purpose would there be for submitting the mitigating circumstances to the jury on a written list? To require both the mitigating and aggravating circumstances to be submitted in the form of "written . . . issues" clearly imports a legislative

intent that the jury consider and answer them as such. The very term "Issues" as applied to a trial generally refers to factual or legal questions which must be answered in order to resolve the dispute. If the issues are factual they are resolved by the trier of fact. "An 'issue' is a disputed point or question . . . upon which [parties to an action] are desirous of obtaining either decision of court on question of law or of court or jury on question of fact." Black's Law Dictionary (5th ed. 1979).

To require the jury to indicate in writing the mitigating circumstances it finds to exist has been the practice followed by our trial judges in every case tried under the new death penalty statute which has been determined by this Court and in which the jury recommended death except for the instant case; State v. Taylor, decided this day and in which I also dissent in part; and State v. Hamlette, 302 N.C. 490, 276 S.E. 2d 388 (1981).[1] The cases are: State v. Irwin, No. 26, Fall Term 1981, presently pending in the Court; State v. Hutchins, 303 N.C. 321, ___ S.E. 2d ___ (1981); State v. Martin, 303 N.C. 246, 278 S.E. 2d 214 (1981); State v. Silhan, supra, 302 N.C. 223, 275 S E. 2d 450; State v. Oliver and Moore, 302 N.C. 28, 274 S.E. 2d 183 (1981); State v. Small, 301 N.C. 407, 272 S.E. 2d 128 (1980); State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286

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[1] In Hamlette, however, no specific mitigating factors were proffered. Only the catchall section (f)(9) was used and the jury answered it "none."

(1980), cert. denied, ___ U.S. ___, 101 S.Ct. 1731, 68 L. Ed. 2d 220 (1981); State v. Detter, 298 N.C. 604, 260 S.E. 2d 567 (1979); State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979); State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), cert. denied, 448 U.S. 907 (1980); State v. Spaulding, 298 N.C. 149, 257 S.E. 2d 391 (1979); State v. Cherry, supra, 298 N.C. 86, 257 S.E. 2d 551, cert. denied, 446 U.S. 941; State v. Johnson, supra, 298 N.C. 47, 257 S.E. 2d 597; State v. Goodman, supra, 298 N.C. 1, 257 S.E. 2d 569; State v. Jones, 296 N.C. 495, 251 S.E. 2d 425 (1979). Presumably our trial judges in these cases were following the statutory requirements as they understood them to be. This is a strong indicator that the statute should be interpreted to accord with the practice which has evolved pursuant to its provisions particularly when such an interpretation is the more reasonable one when the statute is considered as a whole.

Furthermore this Court has determined that the defendant must prove each mitigating circumstance which he proffers by the greater weight of the evidence and that upon his timely request he is entitled to a peremptory instruction in his favor where "all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist." State v. Johnson, supra, 298 N.C. at 76, 259 S.E. 2d at 618. Surely this holding contemplates a statute which requires not only that a written list of mitigating circumstances be submitted, but that the jury indicate on the list its findings as to each such circumstance submitted.

Requiring the jury to specify in writing the aggravating, but not the mitigating, circumstances which it finds to exist not only violates G.S. 15A-2000, but it also prejudices the defendant at the sentencing hearing. It encourages the jury to think that the mitigating circumstances are less worthy of consideration than the aggravating circumstances. Under this practice the jury is not required, as it should be, to focus its full attention on each submitted mitigating circumstance individually in order to determine whether it exists. Yet this kind of determination is necessarily prerequisite to the jury's determination whether the mitigating circumstances "are insufficient to outweigh the aggravating circumstances." The danger in not requiring the jury to specify its findings regarding the individual mitigating circumstances is that the jury will not, because it thinks it need not, decide which mitigating circumstances it believes do in fact exist, but will simply determine amorphously that whatever the mitigating circumstances may be, they do not outweigh the aggravating circumstances. This kind of determination fails to give a defendant the benefit of a particularized consideration of each circumstance which might militate against putting him to death.

Such a determination probably violates a capital defendant's constitutional right to "individualized consideration" as that concept was expounded in Lockett v. Ohio, 438 U.S. 586, 604-05 (1978)(Burger, C.J.; plurality opinion):

> "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
>
> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (Emphasis original.)

Under our statutory scheme permitting the jury to return a recommendation for death without requiring it to specify which mitigating circumstances it finds to exist so dilutes the jury's constitutional duty to consider, in the words of Lockett, "any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death" and to give them "independent mitigating weight"

that it skirts dangerously close to violating these constitutional requirements.

The majority relies on Gregg v. Georgia, 428 U.S. 153 (1976) to sustain its interpretation of our statute against constitutional attack. I believe the reliance is misplaced. Our statutory scheme for imposing the death penalty and that of Georgia's are quite different. Our statute not only suggests a list of mitigating circumstances which might be proffered by the defendant but it requires that the list be submitted to the jury in writing along with a written list of the aggravating circumstances. The Georgia statute permits the jury to consider any mitigating factor but none of these factors are enumerated, specified, or otherwise suggested to the jury. Ga. Code Ann. § 27-2534.1. Under our statute, as I have noted, the jury is required to balance carefully various enumerated mitigating circumstances with various enumerated aggravating circumstances submitted in the form of written issues in determining whether to recommend a sentence of death or life imprisonment. Under Georgia law the jury "is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court . . . but it must find a statutory aggravating circumstance before recommending a sentence of death." Gregg v. Georgia, supra, 428 at 197. (Emphasis original.) Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no

matter how it regards the mitigating circumstances.[2] In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more aggravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

Under our statute the jury's sentence determination is far more carefully channeled. The entire thrust of our statute is directed toward insuring that the jury fully understand both the aggravating and mitigating circumstances so that it may carefully balance them against each other in arriving at its sentence determination. State v. Johnson, supra, 298 N.C. 47, 257 S.E. 2d 597. Thus the existence or non-existence of mitigating circumstances looms far more crucial to the jury's ultimate determination under our statute than it does under Georgia's. For this reason the majority's conclusion that our statute does not require the jury to answer specifically the written issues relating to mitigating factors but only those

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[2]Ga. Code Ann. § 27-2534.1. The judge or jury is required simply "to consider any mitigating circumstances." Id.

relating to aggravating factors may well render the statute violative of the constitutionally required individualized consideration in a capital case even though Georgia's procedure was sustained in Gregg. For the jury here is given both lists of aggravating and mitigating issues, in writing, told to answer the issues relating to aggravating factors in writing, and then told to make its life or death decision on the basis of what is essentially a careful balancing of the aggravating against the mitigating circumstances. Yet at the same time the jury is told that it really should not answer in writing the individual issues relating to mitigating circumstances. This procedure is bound to diminish in the jury's mind the importance of its determination with regard to each mitigating factor submitted, a determination which, under our statute, is crucial to its ultimate decision. It makes it less likely, and I believe unconstitutionally so, that the jury will find the mitigating circumstances sufficient to outweigh the aggravating. Indeed, it makes it less likely that the ultimate sentence determination will be based on that kind of individualized determination that our statute contemplates and the constitution requires.

Furthermore, not requiring the jury to specify which mitigating circumstances it finds to exist prejudices the defendant's ability to obtain that review of his sentence required by G.S. 15A-2000(d)(2), sometimes referred to as our proportionality review, unless the Court is willing to sustain the sentence upon

the assumption that the jury answered all mitigating circumstances[3] submitted to it in favor of the defendant. The majority here is apparently willing to sustain this sentence even after making that assumption. I could not vote to sustain the death sentence if the jury had answered all mitigating circumstances in defendant's favor. If this had happened, I, for reasons hereinafter stated, would vote to remand for the imposition of a sentence of life imprisonment, although I, like the majority, am repulsed by the gruesome circumstances of defendant's crimes. Since I cannot on this record know how the jury answered these issues, I must, for this additional reason, vote to remand for a new sentencing hearing at which the jury would be directed to give its answers to these issues.

The statute mandates that we consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2). (Emphasis supplied.) Obviously the statute contemplates that we compare not only the circumstances under which the crime was committed but that we also

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[3]These circumstances are listed in the majority opinion at n. 1.

look to the nature, character, and background of the defendant committing it. I have already noted the stress which the United States Supreme Court in Lockett v. Ohio, supra, 438 U.S. 586, placed on the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual" and "the need for individualized consideration as a constitutional requirement in imposing the death sentence." Generally the mitigating circumstances proffered by a defendant in a capital case will pertain to his individual character, personal history, mental and emotional stability, and background; while the aggravating circumstances generally relate to the circumstances of the crime itself. We cannot, therefore, determine whether the sentence of death in any particular case is excessive or disproportionate when compared with similar cases "considering both the crime and the defendant" unless we know both the aggravating and the mitigating circumstances found by the jury to exist. This is particularly true with two of the mitigating circumstances submitted in this case, i.e., that the murder was committed while the defendant "was under the influence of mental or emotional disturbance" and that the capacity of the defendant "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." G.S. 15A-2000(f)(2) and (6).

An examination of capital cases so far determined by this Court reveal that jury determinations with regard to the

existence of these two mitigating circumstances is perhaps the most crucial factor in the jury's ultimate recommendation. In every case in which the jury rejected both of these circumstances, the jury has returned a death sentence recommendation. Detter, Barfield, Martin, Cherry and Irvin. In the five cases in which the jury considered only one of these mitigating circumstances and rejected it, the jury recommended death in three, Jones, Goodman, and Small, and life in two, Crews and Atkinson.[4] On the other hand, of the ten cases in which either or both of these mitigating circumstances were submitted and answered affirmatively by the jury, Turpin, Johnson I, Spaulding, Poole, Johnson II, Taylor, Ferdinando, Myers, King, and Hutchins,[5] the jury returned a recommendation for life imprisonment in all but four cases, Johnson I, Spaulding, Johnson II and Hutchins.

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[4]All the listed cases are cited previously except State v. Atkinson, 298 N.C. 673, 259 S.E. 2d 858 (1979); State v. Crews, 296 N.C. 607, 252 S.E. 2d 745 (1979).

[5]All the listed cases are cited previously except State v. King, 301 N.C. 186, 270 S.E. 2d 98 (1980); State v. Myers, 299 N.C. 671, 263 S.E. 2d 768 (1980); State v. Ferdinando, 298 N.C. 737, 260 S.E. 2d 423 (1979); State v. Taylor, 298 N.C. 405, 259 S.E. 2d 502 (1979); State v. Poole, 298 N.C. 254, 258 S.E. 2d 339 (1979); and State v. Turpin, 296 N.C. 607, 252 S.E. 2d 745 (1979).

In State v. Crawford, 301 N.C. 212, 270 S.E. 2d 102 (1980), the two mitigating factors were not submitted, but the jury nevertheless found that "the financial and emotional burdens and hardships created by his children" were a mitigating circumstance; and it recommended life imprisonment.

Of these four, however, Johnson I and Johnson II were remanded for a new sentencing hearing because of improper instructions on the diminished capacity circumstance. At the new sentencing hearings in both cases, at which presumably appropriate instructions were given, the juries returned a life imprisonment recommendation. Furthermore Spaulding was remanded for a new trial for errors committed in the guilt phase. At Spaulding's retrial life imprisonment was imposed because the jury was unable to reach a unanimous verdict. Consequently of the ten cases in which either or both of these mitigating circumstances was found in defendant's favor, only one of the defendants, Hutchins, received a death sentence which was ultimately affirmed by this Court. In Silhan's first trial, State v. Silhan, supra, 302 N.C. 223, 275 S.E. 2d 450, neither of these mitigating circumstances was submitted to the jury and the jury recommended the death sentence. On retrial, however, both circumstances were submitted. The jury rejected the impaired capacity circumstance and found the emotional disturbance circumstance to exist. The jury recommended life imprisonment.[6]

This analysis demonstrates that juries in North Carolina almost never recommend the death penalty after they determine that at the time of the crime the defendant was either under the

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[6]State v. Silhan, No. 79-CRS-1943, 81-17-259 (Columbus Superior Court). With respect to all the North Carolina capital cases discussed in this dissent, information not found in the opinions of this Court may be found in the records on appeal or from the appropriate superior court clerks.

influence of mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct and to conform his conduct to law was impaired. Likewise this Court should be slow to affirm a death sentence in which these mitigating circumstances are present. The law's humanity would seem to dictate that rarely if ever should death be the appropriate punishment for a defendant who kills under the influence of a mental or emotional disturbance and whose capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law is impaired. Punished he should be. But execution of a defendant whose crime is the product of a mentally and emotionally defective personality and who suffers from an incapacity to control his conduct is excessively vindictive. It marks society itself with the same kind of unnecessary barbarity which it claims to be punishing in the defendant. The death penalty, if we are to have it at all, should be reserved for first degree murders which are the products of the meanness of mature, calculating, fully responsible adults.

John Rook, <u>if</u> the jury answered all the mitigating circumstances in his favor, would not be that kind of defendant. His evidence presented at the sentencing phase included the testimony of family members and two psychiatrists. Rook, age 21 at the time of the offense, was the product of an abnormally deprived, if not depraved, childhood. Both parents were alcoholics. His father began to give him alcoholic beverages at the early age

of three years because he enjoyed watching him become intoxicated. His father regularly and without provocation required Rook to undress and submit to severe beatings. Early in his life Rook began to use alcohol on a regular basis and later became a regular user of a multitude of various illegal drugs such as cocaine, marijuana, and speed. Rook spent much of his early teenage years in juvenile detention facilities, but his problems stemmed from his addiction to alcohol and drugs. When he was not under the influence of these substances he was a loving and affectionate husband and brother. On the date of the offense in question Rook was under the influence of both alcohol and drugs. According to the psychiatrists who testified he was under the influence of a mental and emotional disturbance at the time of the crime and was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. He expressed remorse for his actions to both psychiatrists who examined him and he ultimately cooperated fully with investigators after acknowledging to them that he needed help.

This evidence formed the basis for most of the mitigating circumstances submitted to the jury for its determination. If we assume that the jury answered these mitigating circumstances in defendant's favor, it accepted this evidence as true.

Only three aggravating circumstances were submitted to the jury. Other than the circumstance that the murder was

especially heinous, the only other aggravating circumstances were the rape and the kidnapping of the murder victim herself. But if the jury answered the mitigating circumstances in defendant's favor, these crimes, like the murder, were the products of defendant's mental and emotional disturbance and his diminished capacity to appreciate their criminality and to conform his conduct to the requirements of law. If defendant's evidence is believed the whole awful incident is, really, attributable to the tragic personality defects traceable to a depraved childhood of a young, immature, mental defective spurred on by the influence of alcohol and drugs.

Of the capital cases so far determined by this Court, then, Rook would be the only defendant other than Spaulding and Hutchins for whom the jury after answering upon proper instructions the emotional disturbance or diminished capacity issue in defendant's favor also recommended death. As earlier noted, on Spaulding's second trial the jury could not agree on the sentence, and a life sentence was ultimately imposed. Yet Rook, from the standpoint of his background, is far more deserving of mercy than Spaulding or Hutchins. Spaulding was a mature adult who at the time of the murder in question was already serving a life sentence for two prior murders. Records and Briefs, Spring Term 1970, No. 10, p. 127. Hutchins was also a mature adult.[7] He was convicted by the jury of murdering one

[7] I dissented in Hutchins and voted to give him a new trial on the merits because of an irreconcilable conflict between him and his trial counsel, a conflict which I also believed probably contributed to the jury's ultimate recommendation of death.

after the other three law enforcement officers, all of whom were attempting to apprehend him. The killings were apparently the product of Hutchins' blind rage. Although he contended he suffered from paranoid psychosis, only one mitigating circumstance was answered by the jury in Hutchins' favor, i.e., that he was under the influence of a "mental or emotional disturbance." The jury rejected Hutchins' proffered circumstance that his capacity to appreciate the criminality of his act or to conform his conduct to law was diminished. It also concluded that there were no other unspecified mitigating circumstances in his case.

If we assume the jury believed Rook's evidence in mitigation and answered all mitigating circumstances in his favor, he would be the first defendant finally sentenced to die who at the time of the murder was under the influence of a mental and emotional disturbance and whose capacity to appreciate the criminality of his conduct or to conform his conduct to law was impaired. Considering this, and considering the many other mitigating circumstances submitted in his favor, e.g., his age, depraved childhood, subnormal intelligence, alcoholism and drug addiction, cooperation with investigators, and the fact that this awful incident is totally out of character for him when he is not under the influence of drugs and alcohol, I would have to conclude that the sentence of death recommended by the jury was disproportionate to the penalty imposed in similar cases

considering both the crime and the defendant. My vote would then be to remand the case for the imposition of a sentence of life imprisonment.

Since I cannot know how much of defendant's evidence in support of his proffered mitigating circumstances the jury accepted in view of the jury's failure to answer these issues, I vote to remand the case for a new sentencing hearing at which these issues would be answered.

APPENDIX B

No. 2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1981

****

STATE OF NORTH CAROLINA)
)
v.) From Wake
)
JOHN WILLIAM ROOK)

****

ORDER STAYING EXECUTION OF DEATH SENTENCE

Defendant was indicted for, inter alia, first-degree murder and convicted at the 6 October 1980 Criminal Session of Wake County Superior Court. Defendant was sentenced to death in an order entered by Judge Giles R. Clark on October 27, 1980.

In an opinion filed 3 November 1981, this Court found no error in either the guilt-determination phase or sentencing phase of defendant's trial. Defendant's death sentence was thus undisturbed. Defendant's attorney filed with this Court on 16 December 1981 a motion for stay of execution of the death sentence on the ground that he intends to file a petition for writ of certiorari in the Supreme Court of the United States pursuant to Rule 22 of that Court.

It is therefore ORDERED:

1. That defendant's execution be and the same is hereby stayed pending further orders of this Court.

2. That defendant shall remain in the custody of the Department of Correction pending further orders of this Court.

3. That defendant serve a copy of his petition to the Supreme Court of the United States and of any subsequent motion or petition in furtherance of these proceedings upon the Attorney General of North Carolina and the Clerk of this Court.

4. That a certified copy of this order be served on the Warden of Central Prison in Raleigh, North Carolina.

This the 17th day of December 1981.

Joseph Branch

JOSEPH BRANCH, CHIEF JUSTICE
SUPREME COURT OF NORTH CAROLINA

The foregoing order is issued over my hand and the seal of the Supreme Court this 17th day of December 1981.

J. Gregory Wallace

J. GREGORY WALLACE
CLERK OF THE SUPREME COURT

Appendix C

Supreme Court of the United States

No. A-591

JOHN WILLIAM ROOK,

Petitioner

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 1, 1982.

/s/ Warren E. Burger

Chief Justice of the United States.

Dated this 30th day of December, 1981

North Carolina General Statute 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. -- (a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matters relating to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

Appendix C

Supreme Court of the United States

No. A-591

JOHN WILLIAM ROOK,

Petitioner

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(x),

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/s/ Warren E. Burger

Chief Justice of the United States.

Dated this 30th day of December, 1981

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(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matters relating to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. -- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In the review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. -- Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

81-6143

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

V.

STATE OF NORTH CAROLINA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, John William Rook, by his undersigned counsel, ask leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of cost and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the Petitioner, who is presently incarcerated at Central Prison in Raleigh, North Carolina. Mr. Rook's affidavit in support of this Motion will be forwarded to the court immediately upon receipt.

J. Franklin Jackson
DOFFERMYRE AND JACKSON, P. A.
P. O. Box 1029
Dunn, North Carolina 28334
Phone: (919) 892-2145

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Phone: (919) 828-4486

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IN THE

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OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

V.

STATE OF NORTH CAROLINA,

Respondent.

AFFIDAVIT

J. FRANKLIN JACKSON, being duly sworn, states:

1. I am attorney for John William Rook, the Petitioner in the above captioned action, and make this affidavit in support of Mr. Rook's Motion for leave to proceed in forma pauperis. My representation of Mr. Rook is without remuneration.

2. Mr. Rook is presently in the custody of the State of North Carolina and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Rook by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Rook is attached hereto.

3. Counsel was appointed to represent Mr. Rook at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Rook is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Rook is entitled to redress in this action.

J. Franklin Jackson

STATE OF NORTH CAROLINA

COUNTY OF SAMPSON

The foregoing affidavit of J. Franklin Jackson, was subscribed and sworn to before me this 27th day of January, 1982.

Grace M (Scott) Jones N.P.

My Comm. expires: 3/17/85

IN THE

SUPREME COUT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

V.

STATE OF NORTH CAROLINA,

Respondent.

M O T I O N

I, JOHN WILLIAM ROOK, being duly sworn, depose and say, in support of my Motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the Petitioner in the above captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said costs.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Wake County, at trial court of the State of North Carolina, of murder, kidnapping and rape, and was sentenced to death. I am being held at the Central Prison in Raleigh, North Carolina. I believe errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional right.

NORTH CAROLINA
WAKE COUNTY

_____
John William Rook

The foregoing affidavit of John William Rook, was subscribed and sworn to before me this ____day of _____, 1982.

_____N.P.

My Comm. expires: _____

file room

81-6143

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

V.

STATE OF NORTH CAROLINA,

Respondent.

MOTION

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3. I am unable to give security for said costs.

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I was convicted in the Superior Court of Wake County, at trial court of the State of North Carolina, of murder, kidnapping and rape, and was sentenced to death. I am being held at the Central Prison in Raleigh, North Carolina. I believe errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional right.

John W. Rook.
John William Rook

NORTH CAROLINA
WAKE COUNTY

PAUL R. HUGHES NOTARY PUBLIC WAKE COUNTY, N.C.

The foregoing affidavit of John William Rook, was subscribed and sworn to before me this 29 day of Jan, 1982.

Paul R. Hughes N.P.

My Comm. expires: [illegible] April 22, 1984

Office-Supreme Court, U.S.
FILED
FEB 27 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-6143

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO "INDIVIDUALIZED CONSIDERATION" AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN BEING SENTENCED TO DEATH PURSUANT TO A STATUTE THAT PERMITTED THE JURY TO RETURN ITS RECOMMENDATION FOR A SENTENCE OF DEATH WITHOUT SPECIFYING WHICH OF THE MITIGATING CIRCUMSTANCES IT FOUND TO EXIST.

TABLE OF CONTENTS

Page

Question Presented. I,2

Citation to Opinion Below. 1

Jurisdiction. 2

Constitutional and Statutory Provisions Involved. 2

Statement of Case. 3

Reasons Why the Writ Should Not Issue. 7

Conclusion. 17

Certificate of Service. 18

TABLE OF AUTHORITIES

CASES

Federal:

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). 12,14,16

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). 14

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 937 (1978). 9,10,12,13,14

State:

Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980). 12,14

Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978). 12

Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978). 12

State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, reh denied, 448 U.S. 918, 101 S.Ct. 40, 65 L.Ed.2d 1181 (1980). 13

State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979). 10,12,14

Page

State v. Rook, ____ N.C. ____, 283 S.E.2d 732 (1981). 1,7,15

Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977). 15

Constitutional Provisions:

United States Constitution, Eighth Amendment. 2

United States Constitution, Fourteenth Amendment. 2

Rules:

Rules of the Supreme Court of the United States
Rule 22. 1
Rule 46.5. 1

Statutes

Georgia Code Annotated
§27-2534.1. 12,13
§27-2537(c). 16

North Carolina General Statutes
§14-17. 2
§15A-2000. 3,8,9,10,12,13,14,15,16

Texas Code Criminal Procedure
§37.071. 14

28 United States Code
§1257(3). 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6143

JOHN WILLIAM ROOK,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of John William Rook and prays that this Court deny such petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Wake County, North Carolina. In an opinion reported in State v. Rook, ____ N.C. ____, 283 S.E.2d 732 (1981) [No. 2 - Fall Term], the Supreme Court of North Carolina found no error in the conviction and affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO "INDIVIDUALIZED CONSIDERATION" AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN BEING SENTENCED TO DEATH PURSUANT TO A STATUTE THAT PERMITTED THE JURY TO RETURN ITS RECOMMENDATION FOR A SENTENCE OF DEATH WITHOUT SPECIFYING WHICH OF THE MITIGATING CIRCUMSTANCES IT FOUND TO EXIST.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17 . . . A murder which shall be perpetrated by means of poison, lying in wait,

imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."

§15A-2000 [See Appendix A of Response to Petition for Writ of Certiorari, infra; this is included only because Appendix D of Petitioner's Petition for Writ of Certiorari is incomplete.]

STATEMENT OF CASE

The evidence of record presented by the State during the guilt-innocence phase of this bifurcated proceeding tended to show that at approximately 7:20 p.m. on May 12, 1980, Ann Marie Roche, a registered nurse, was walking home along a street in Raleigh, North Carolina. As she was nearing an intersection, the defendant who was operating a borrowed automobile, turned in front of Ms. Roche and blocked her path. The defendant beckoned Ms. Roche and she approached the car. The two began talking for several minutes and then began arguing and, within seconds, the defendant began to beat her. (R. pp. 122-126)*

All of this was observed by two witnesses, a homeowner and a jogger. The jogger approached the car just as defendant was beating Ms. Roche, observed that her face and arms were cut and bleeding, and saw the defendant was crouching over her, armed with a stick or some other object about one or two inches in diameter. The jogger asked if he could help and the defendant replied, "just go on, man, this doesn't concern you." Both witnesses observed the vehicle leave with Ms. Roche in the passenger seat with her head down, crying. The jogger wrote down the license number of the vehicle and gave a copy to the homeowner. (R. pp. 123-128)

[*R.p. indicates page numbers of Record on Appeal where the the testimony can be located.]

Two other persons were eyewitnesses to the struggle between Ms. Roche and defendant. In all, three individuals positively identified the defendant as the assailant and the other eyewitness gave a description which matched that of the defendant. (R. pp. 126-131)

On May 13, 1980, at approximately 7:30 p.m. a policeman on routine patrol at Dorothea Dix Hospital in a large, remote, open field discovered a pile of clothing and a billfold. A short distance away, he observed a body and notified other officers. (R. pp. 108-109) Subsequently, a crime scene specialist was called to the scene and he observed a white female body, badly bruised and battered with cuts and abrasions. The ground around the body was covered with blood. The body was nude and was approximately thirty-five feet from the pile of clothing. The body was identified as Ann Marie Roche. (R. pp. 97-108, R. p. 122)

The pathologist testified that his autopsy showed numerous injuries to the victim. He observed cuts on the front part of her body, all parallel. The cuts were straight and uniform in depth, and in the pathologist's opinion, had been deliberately inflicted "with some care and effort " and were made by a knife. (R. p. 166) He also found numerous lacerations on her head and hands which were, in his opinion, produced by beating with a long, blunt instrument with a round striking surface. In addition to numerous cuts and abrasions, the victim's left leg was completely fractured and broken; the pelvis was fractured and separated; her rib was broken; severe internal bleeding had occurred; and he found injuries to the vaginal area which, in his opinion, could have been produced by forcible sexual intercourse. The compression injuries in the pelvic region were consistent with the victim having been struck by an automobile. The pathologist estimated that the victim could have remained alive from a period of two hours to twenty-four

hours after receiving the injuries she sustained. His opinion was that Ms. Roche died as a result of loss of blood from the many injuries he observed. (R. pp. 164-174)

A State Bureau of Investigation forensic serologist testified that he visited the crime scene and performed numerous tests. One particular observation was that a large bloody smear was, in his opinion, consistent with a large bloody object, like a body, being rolled or dragged down the slope of the field. He also subsequently examined the automobile and found blood in numerous places consistent with that of the victim. He also performed tests on the vaginal and anal smears taken from the victim during the autopsy and found the presence of spermatozoa. (R. pp. 111-117)

From the license number recorded by the eyewitnesses to the kidnapping, the police were able to trace the car and locate the owner. The owner was questioned and she stated that it had been borrowed prior to the offense and returned shortly thereafter by the defendant. The owner's description of the defendant's dress and appearance matched that of the eyewitnesses. (R. pp. 159-164)

The defendant was taken into custody and thereafter a search warrant was obtained to search defendant's residence and the vehicle. A pair of bloodstained blue jeans and a knife were recovered. (R. p. 136) An expert testified that the blood on the jeans was consistent with that of the victim and could not have originated from the defendant. (R. p. 117)

On May 15, 1980, officers began interviewing the defendant. After advising him of his Miranda rights, the defendant executed a waiver of those rights, and gave the officers a statement. In that statement, he admitted borrowing the automobile and observing the victim walking along the road. He admitted scuffling with her and driving her to the field. He further stated that he told her to get out of the car and that he "tried to get into her pants." He stated that she resisted and

he went to the trunk of the vehicle, removed a tire tool and struck the victim several times. He then proceeded to have forcible sexual intercourse and that he continued to strike her with the tire tool and a knife. He then attempted anal intercourse and when she again resisted, he hit her again and she just laid there bleeding. He stated that he got in his car and admitted running over the victim, although he stated he did not do so intentionally. He said that he spun the tires to free the car and drove home. (R. pp. 141-151)

The defendant offered no evidence during the guilt determination phase of the trial.

Upon receiving the jury verdict finding defendant guilty of first degree murder, first degree rape, and kidnapping, the trial court convened the sentence determination phase of the trial before the same jury. The State offered no evidence during this phase choosing to rely instead on the evidence introduced at the guilt determination phase. The defendant presented evidence from his brother and sister describing in great detail their life with their parents. Also, the defendant presented the testimony of two psychiatrists, a neighbor, and his wife. (R. pp. 202-235)

At the conclusion of the testimony, the trial court instructed the jury on the sentencing phase. Three aggravating circumstances were submitted to the jury: (1) whether the murder was committed while the defendant was engaged in the commission of the rape of the victim; (2) whether the murder was committed while the defendant was engaged in the commission of the kidnapping of the victim; and (3) whether the murder was especially heinous, atrocious or cruel. Sixteen mitigating circumstances were submitted to the jury. (R. pp. 258-260) The jury found beyond a reasonable doubt each of the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The jury also found one or more mitigating circum-

stances, although it did not designate which of the sixteen were found, and then found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. The jury then returned a recommendation that the death penalty be imposed, and the court entered judgment imposing the death penalty for the crime of first degree murder. Defendant also received consecutive life sentences for the crimes of kidnapping and first degree rape. (R. pp. 260-268)

The defendant appealed his conviction and sentence to the North Carolina Supreme Court. The Court found no error in either phase of the trial. A further summary of the facts can be found as set forth in the opinion of the Court in State v. Rook, ____ N.C. ____, 283 S.E.2d 732 (1981), a copy of which is attached to the Petition for Writ of Certiorari as Appendix A.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THERE IS NO CONSTITUTIONAL OR STATUTORY REQUIREMENT THAT THE JURY MAKE SPECIFIC FINDINGS ON MITIGATING CIRCUMSTANCES AND THE FAILURE OF THE SUPREME COURT OF NORTH CAROLINA TO SO REQUIRE DOES NOT VIOLATE PETITIONER'S RIGHT TO "INDIVIDUALIZED CONSIDERATION" AS A CONSTITUTIONAL REQUIREMENT IN IMPOSING THE DEATH SENTENCE.

Petitioner contends that it is prejudicial error, of constitutional dimensions, for the jury to return a sentence recommendation of death under a procedure whereby the jury is not required to specify which of the mitigating circumstances it finds, or does not find. Petitioner contends that such a procedure violates his Eighth and Fourteenth Amendment rights under the United States Constitution. There is no merit in this contention for there is no statutory or constitutional requirement that the jury make specific findings and, furthermore, the Petitioner cannot demonstrate any prejudice in the instant

case.

G.S. 15A-2000, which sets out the procedures for the sentencing phase in a capital case, requires the jury to indicate in writing which of the aggravating circumstances it finds beyond a reasonable doubt. G.S. 15A-2000(c) provides as follows:

> "(c) Findings in Support of Sentence of Death. - When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which shall show:
>
> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond reasonable doubt; and
>
> (2) That the statutory aggravating circumstance or circumstances are sufficiently substantial to call for the imposition of the death penalty; and,
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found."

There is, thus, no requirement that the jury find the mitigating circumstances submitted to them in writing. It is sufficient under the statute that they find, in writing, only that any mitigating circumstances found are insufficient to outweigh any aggravating circumstances found in returning a recommendation of death. In the instant case, the jury found the three aggravating factors submitted to them beyond a reasonable doubt.[1] The

---

[1]The aggravating factors submitted to the jury together with the jury's answers are as follows (R. p. 258):

> "(1) Was this murder committed while John William Rook was engaged in the commission of the rape of Ann Marie Roche?
> Answer: Yes
>
> (2) Was this murder committed while John William Rook was engaged in the commission of the kidnapping of Ann Marie Roche?
> Answer: Yes
>
> (3) Was this murder especially heinous, atrocious, or cruel?
> Answer: Yes"

second issue required the jury to unanimously find beyond a reasonable doubt that the aggravating circumstances so found by them to be sufficiently substantial to call for the imposition of the death penalty. They answered that issue "Yes". (R. p. 258) They then proceeded to issue three which reads together with their answer on the verdict sheet as follows (R. p. 259):

> "ISSUE THREE:
>
> Do you find one or more mitigating circumstances:
>
> Answer: Yes
>
> BEFORE YOU ANSWER ISSUE THREE, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCE YOU DO OR DO NOT FIND.
>
> IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES", IN THE SPACE AFTER ISSUE THREE, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO", IN THAT SPACE."

Finally, in issue four, the jury was required to unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances. They answered that issue "Yes" and entered a sentence recommendation of death. (R. p. 260) It is clear that the procedure followed in the instant case fully comports with the requirements of G.S. 15A-2000.

However, Petitioner argues that such procedure violates this Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) in that the Petitioner was denied "individualized consideration" as required by the Eighth and Fourteenth Amendments. To the contrary, G.S. 15A-2000(f) states (see Appendix A attached hereto):

> "(f) Mitigating circumstances. - Mitigating circumstances which may be considered shall include, but not be limited to, the following:
>
> ****
>
> (9) Any other circumstance arising from the evidence which the jury deems to have mitigating value."

In State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979), the Supreme Court of North Carolina held that any relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, be submitted to the jury in writing. The Court stated at page 72:

> "If, however, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.
>
> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others which might be included in the 'any other circumstance' provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra, 438 U.S. 586.
>
> ****
>
> Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing structure, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others."

It is clear that both G.S. 15A-2000 and the North Carolina Supreme Court's construction of that statute do not preclude the jury from considering as a mitigating factor, ". . . any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death. . ." [Lockett v. Ohio, supra, at p. 604.] In the instant case, some sixteen mitigating circumstances, including the "catch-all" [15A-2000(f)(9)]

circumstance, were submitted in writing to the jury.[2] Thus,

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[2]The mitigating factors submitted to the jury in the instant case were (R. pp. 259-260):

"(1) That this murder was committed while John William Rook was under the influence of mental or emotional disturbance.

(2) The capacity of John William Rook to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of John William Rook at the time of this murder is a mitigating circumstance.

(4) John William Rook, in his formative years, was subjected to cruelty and physical abuse by his parents.

(5) John William Rook, in his formative years, was subjected to mental abuse by his parents.

(6) John William Rook, in his formative years, was subjected to emotional abuse by his parents.

(7) John William Rook has been a loving and affectionate husband to his wife.

(8) John William Rook has been loving and affectionate to his brothers and sisters and their children.

(9) John William Rook is an alcoholic.

(10) John William Rook is an abuser of drugs and is addicted to drugs.

(11) John William Rook was sexually abused by an older man whom he lived with when he was 10 years old in order to have a more stable home environment.

(12) John William Rook had a deprived and chaotic childhood in which he was schooled in violence and criminality by his parents.

(13) John William Rook now has an IQ of 71 and received very little education in his formative years.

(14) John William Rook, in his formative years, received very little religious and moral training.

(15) John William Rook confessed in detail as to what he did and cooperated with the detectives and investigators of the Raleigh Police Department and Wake County Sheriff's Department as to his involvement.

(16) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."

the procedure followed fully comports with Lockett.

What is at issue here is simply whether the jury is constitutionally required to specifically record after each mitigating factor on the verdict sheet whether or not they so found, instead of generally indicating that they found one or more mitigating circumstance. The State of North Carolina submits that there is no such constitutional requirement. This Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) upheld the Georgia statutory scheme for the imposition of the death penalty. G.S. 15A-2000 is similar to the Georgia statutory scheme. In Georgia, once guilt is determined, the same jury hears evidence concerning the circumstances of the crime and the criminal before making a sentence recommendation. The Georgia statute does not list any factor which constitutes a mitigating circumstance but rather allows the jury to determine whether any facts proved at the sentencing hearing mitigate against imposition of the death penalty. Ga. Code Ann. § 27-2534.1 (1978). As well, the trial court in charging the jury need not single out specific mitigating circumstances. See Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978); Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977). The Georgia Supreme Court in the case of Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980) held that it was not error for the trial court to refuse to charge on specific mitigating factors sought by the defendant. They held that the Georgia courts are not required to note specific mitigating factors in charging the jury. As stated earlier, this scheme has been approved as constitutional in Gregg. A fortiorari, the State of North Carolina respectfully submits that G.S. 15A-2000(f), which sets out specific statutory mitigating circumstances and the decision of the North Carolina Supreme Court in State v. Johnson, supra, requiring the trial

courts to submit those statutory circumstances, supported by the evidence, as well as any others which are not listed in the statute, when requested by the defendant and supported by the evidence, provides, under Lockett analysis, a more reliable safeguard against arbitrary and excessive death sentences than does the Georgia procedure. The State of North Carolina contends that by requiring the court to submit the aggravating circumstances arising from the evidence to the jury and requiring the jury to so find in writing properly limits and guides the jury's discretion. Georgia has a similar requirement with respect to aggravating circumstances. Ga. Code Ann. § 27-2534.1(c). No such constitutional necessity exists with respect to the mitigating factors.

The North Carolina Supreme Court in upholding the constitutionality of G.S. 15A-2000 in State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, reh. denied, 448 U.S. 918, 101 S.Ct. 40, 65 L.Ed.2d 1181 (1980) stated at p. 352:

> "While the present North Carolina statute enumerates several mitigating factors to be considered by the jury, it does not limit the jury in its consideration of mitigating factors. A North Carolina jury is specifically empowered to consider '[A]ny other circumstance arising from the evidence which the jury deems to have mitigating value.' In short, while the jury's discretion to impose the death penalty is sharply limited, it retains wide discretion to consider the particular circumstances of the defendant and his conduct so that the punishment which is ultimately imposed is not grossly disproportionate to the crime."

Both G.S. 15A-2000 and the Constitution require the jury to specifically find or not to find each aggravating circumstance because such procedure provides an exercise of guided discretion. However, the jury should remain absolutely unfettered when it comes to considering mitigating factors. A requirement that the jury list each mitigating circumstance might unduly constrain the jury. Requiring the jury to submit in writing which mitigating factors are found may inhibit the jury and prevent them

from considering other mitigating circumstances. This is particularly true with respect to the 15A-2000(f)(9) "catch-all" provision. Petitioner's argument that the jury must be required to designate which of the mitigating factors it finds or does not find, by logical necessity, must include a requirement that the jury list which "other" mitigating factors it finds from all of the evidence. Only then can the reviewing courts know precisely all of the circumstances the jury finds to have mitigating value, whether listed on the jury form or not. To require the jury to so list these factors, the State contends, may limit the jury's discretion which Lockett teaches must remain unbridled. See Collier v. State, supra, 261 S.E.2d, at p. 376.

The Texas statute approved by this Court in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) does not require a listing by the jury of each mitigating factor found. Texas Code Crim. Pro. § 37.071. The Texas statute, in fact, does not even explicitly speak of mitigating circumstances, but rather directs the jury to answer three questions regarding punishment after certain aggravating factors have been found to exist by virtue of a finding of guilt. This Court found that in reaching the answers to those questions evidence in mitigation could be considered and, consequently, the statute was constitutional. G.S. 15A-2000, as compared to the Texas statute, is clearly more likely to provide to the Petitioner the kind of "individualized consideration" as required by Lockett. In fact, G.S. 15A-2000 is significantly more narrow than both the statutes upheld in Gregg and Jurek with respect to aggravating factors; and, far superior with respect to statutory mitigating factors since they are required to be submitted in writing (as well as others arising from the evidence pursuant to State v. Johnson, supra). The State of North Carolina submits that there is simply no constitutional requirement of specific findings on mitigating circumstances.

Petitioner further argues that he is prejudiced upon appeal where the North Carolina Supreme Court was required to determine whether the capital sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," or whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2). There is absolutely no merit in this contention. In the absence of a specific finding by the jury as to the existence or non-existence of each mitigating factor submitted to them, our Supreme Court in reviewing a silent record with respect to this issue will be obligated to assume that the jury found each mitigating factor so submitted to them when they answer issue three "Yes." Thus, in the instant case, the Supreme Court of North Carolina was forced to assume that the jury found all sixteen mitigating factors, which the State would argue that it likely did not find. Such result, therefore, inured to the benefit of the Petitioner and to the detriment of the State. The Petitioner simply was not prejudiced by the failure of the jury to specifically list which mitigating factors it so found. The opinion below in the instant case makes that point clearly, 283 S.E.2d at pp. 752-753:

> "Even were we to accept defendant's argument, we perceive no prejudice to defendant here. Even assuming that the jury accepted all sixteen mitigating circumstances as true, we still could not conclude that the death sentence was arbitrary, excessive or disproportionate. The circumstances of this murder are cruel and gruesome almost beyond belief: a young female, a stranger to the defendant, was stopped while walking home in a residential area while it was still daylight. Almost immediately, defendant began beating her and pulling her around by her hair. He forced her into his car and drove to a deserted field. There, by his own admission, he beat her and cut her with a knife until he gained her submission. Then, he raped her and when he was through, left her to die from her wounds, slowly bleeding to death. The jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. We are unable to disturb the jury's finding and to conclude otherwise. In summary, we find no statutory provision to support defendant's contention nor do we find such a constitutional requirement. Even if

> authority could be found to support defendant's claim, his assignment would be of no avail because he is unable to demonstrate any prejudice whatsoever."

As noted above, the failure of the jury to specifically find each mitigating circumstance does not prejudice the Petitioner but rather prejudices the State. While the opinion below specifically finds it is better practice for the jury to specify which mitigating factors it finds and does not find "for the benefit of this Court in reviewing the appropriateness of the death penalty," the beneficiaries of such a practice will be the State of North Carolina. For, as in the instant case, the failure of the jury to be required to do so puts the Supreme Court of North Carolina in the position of having to assume that the jury found all the mitigating circumstances submitted as well as any other circumstance arising from the evidence that has mitigating value. A review of the evidence of record reveals that the trial court was quite liberal in submitting all sixteen mitigating circumstances. In any event, it is clear that Petitioner was not prejudiced in the appellate review of his sentence by the failure of the jury to be required to record whether or not they found each mitigating circumstance.

Finally, the Georgia statute like G.S. 15A-2000 requires that the jury make specific findings only on aggravating circumstances. Appellate review in Georgia is limited to a consideration of the facts of the crime and the aggravating circumstances found by the jury. Ga. Code Ann. § 27-2537(c). The North Carolina statutory scheme is similar to that of Georgia in that appellate review is likewise limited to a consideration of the circumstances of the crime and the aggravating circumstances found by the jury. This Court has fully and exhaustively reviewed the Georgia statute and procedures and has found them to be constitutional. Gregg v. Georgia, supra. Therefore, there exists no constitutional requirement of specific findings on mitigating circumstances and failure to so require does not

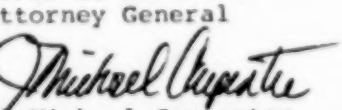
preclude the trial jury from affording to a defendant the "individualized consideration" as a constitutional prerequisite in imposing a sentence of death.

CONCLUSION

The Respondent respectfully submits that Petitioner's Petition for Writ of Certiorari should be denied for he fails to set forth any meritorious basis upon which relief sought should be granted. The State of North Carolina submits that there is no constitutional or statutory requirement that the jury make specific findings on mitigating circumstances and the failure of the North Carolina Supreme Court to so require does not violate Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution. The Petitioner received a fair and impartial trial and was convicted upon overwhelming competent evidence. The sentence of death was imposed by a constitutionally acceptable procedure and such sentence is supported by the evidence. In this regard the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The sentence was imposed under a unambiguous statutory scheme which provides for limited and guided jury sentence recommendations which assure consistency, fairness and restrained discretion.

Respectfully submitted this the 25th day of February, 1982.

RUFUS L. EDMISTEN
Attorney General



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ATTORNEYS FOR RESPONDENT

(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

(4) If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(1977, 2nd Sess., c. 1147, s. 29.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivisions (3) and (4) of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Failure of Trial Judge to Rule within 10 Days. — There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under subsection (a)(4) of this section which provides that, if no ruling has been made by the trial judge on a motion for appropriate relief within 10 days, the motion is deemed denied. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is

discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

Effect of Amendments. — The first 1979 amendment added subdivision (11) to subsection (e).

The second 1979 amendment, effective January 1, 1980, inserted "or a sex offense" near the middle of subdivision (5) of subsection (e).

The 1981 amendment inserted "homicide" near the middle of subdivision (5) of subsection (e). Session Laws 1981, c. 652, s. 2, provides: "This act is effective upon ratification and applies to capital felonies committed on or after that date."

Session Laws 1979, c. 565, s. 2, provides: "This act is effective upon ratification and shall apply to all offenses committed after the date of its ratification." The act was ratified May 14, 1979.

Session Laws 1979, c. 682, ss. 13 and 14, provides:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred, and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Constitutionality. — For discussion of the constitutionality of the North Carolina Death Penalty Statutes, see State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

For discussion of factors governing interpretation of the death penalty statute, see State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Imposition of Penalty Not Mandatory. — The present North Carolina death penalty statutes are not mandatory in nature but instead